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IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

H. STUART CUNNINGHAM, CLERK  
UNITED STATES DISTRICT COURT

ATARI, INC., and MIDWAY  
MANUFACTURING COMPANY,

Plaintiffs,

vs.

No. 81 C 6434

NORTH AMERICAN PHILLIPS CONSUMER  
ELECTRONICS and PARKER TELEVISION

Defendants.

81-2020

TRANSCRIPT OF PROCEEDINGS had in the above-entitled  
cause before the Honorable GEORGE N. LEIGHTON, one of the  
Judges of said Court in his courtroom in the United States  
Courthouse, Chicago, Illinois, on Wednesday, November 25, 1981.

PRESENT:

MR. DAN VITTUM,  
MR. MARTIN L. LAGOD,  
MR. ROBERT KRUPKA,

for the Plaintiff Atari, Inc.;

MR. ERIC COHEN,

for the Plaintiff, Midway Manufacturing Co.;

MR. THEODORE W. ANDERSON,  
MR. JAMES T. WILLIAMS,  
MR. GREGORY B. BEGGS,

for the defendants.

THOMAS F. STRUBBE  
CLERK

Clerk's Copy

1 THE CLERK: 81 C 6434, Atari, Inc., vs. North American  
2 Phillips Consumer Electronics, plaintiffs' motion for a  
3 restraining, preliminary injunction.

4 MR. VITTUM: Good afternoon, your Honor. I am Dan Vittum  
5 representing the plaintiff, Atari. With me is Eric Cohen,  
6 representing co-plaintiff, Midway Manufacturing. Also with  
7 me is Mr. Robert Krupka of our office, also representing  
8 Atari.

9 THE COURT: This is a motion for a preliminary injunction.  
10 MR. ANDERSON: Good afternoon, your Honor, Theodore W.  
11 Anderson for the defendant and with me is Mr. James T.  
12 Williams, also for the defendant, North American Phillips  
13 Consumer Electronics Corporation and for Parker Television,  
14 also.

15 MR. VITTUM: Your Honor, as a result of the conversation  
16 all counsel had with the Court this morning, we had made an  
17 attempt to obtain some stipulations of fact. I do have for  
18 the Court at this time a stipulation of seven -- excuse me,  
19 eight items of fact which occupy some two and a half pages  
20 which I would hand up to the Court now.

21 THE COURT: All right.

22 MR. ANDERSON: I would state, your Honor, there was one  
23 typographical error where "copyrights" was placed in the  
24 stipulation and that has been corrected by deleting the "s"  
25 since there is only one copyright registration involved.

THE COURT: Mr. Grice, do we have the court file here?

1 MR. VITTUM: Perhaps if the Court would like to take  
2 just a moment to read the items that have been stipulated,  
3 that would provide some background we could proceed with  
4 respect to.

5 THE COURT: All right. You may proceed.

6 MR. ANDERSON: Your Honor, may I inquire about the  
7 procedure? I would like very much to make --

8 THE COURT: This is a motion for a preliminary injunction.  
9 That is what it is. I am going to hear evidence.

10 MR. ANDERSON: I would like very much, if possible, to  
11 make a short opening statement before plaintiff proceeds with  
12 its evidence.

13 THE COURT: Well sure. Usually I would think the plaintiff  
14 has the right to make an opening statement.

15 MR. ANDERSON: I assume he might want to too, your Honor.  
16 In order that you can hear the evidence with the background,  
17 with our respective positions in mind, I think it would be  
18 more helpful if I could make a brief opening statement also.

19 THE COURT: Do you have any objection -- well, yes, yes.

20 MR. VITTUM: There is no objection to that, of course.

21 THE COURT: All right. Let me first hear from counsel  
22 for the plaintiffs and then I will hear from counsel for the  
23 defendants. You tell me what you think the evidence is going  
24 to show, what is the underlying theory of the parties and  
25 I will hear evidence and I will make the findings of fact,

1 conclusions of law, and rule on the motion. I hope I can do  
2 it today. No plagiarist can excuse the wrong by showing

3 MR. VITTUM: We are going to do everything we can,  
4 Judge, to permit that. show that the defendant's conduct is

5 THE COURT: All right. You may begin. popular Pac-Man

6 MR. VITTUM: Your Honor, I do not propose to make an  
7 extensive opening statement. Our motion papers were with the  
8 Court, last week. I hope they were complete as to the legal  
9 theories upon which the plaintiffs are proceeding. All I  
10 propose to do with respect to the opening statement, your  
11 Honor, is to provide some initial focus of those factual  
12 matters on which we intend to produce evidence this afternoon.

13 We will demonstrate the two video games to the Court, the  
14 copyrighted Pac-Man game and the defendant's K.C. Munchkin  
15 game. ~~Ironie Corporation against Redman out of the Eastern~~

16 ~~District~~ We will demonstrate to the Court the similarities  
17 in the audio-visual conduct of the two games. ~~to very briefly~~  
18 ~~and say~~ Courts have made clear that the tests of infringement  
19 in a copyright infringement case is one of substantial similar-  
20 ity, whether the ordinary observer finds similarities in the  
21 two works, whether to the ordinary observer it appears that  
22 the accused game has been derived from the copyrighted work.  
23 Substantial similarity does not require that each and every  
24 feature of the copyrighted work be found in the accused work.

25 As the Second Circuit has said, and I quote:

"It's enough that substantial parts were lifted. No plagiarist can excuse the wrong by showing how much of the work he did not pirate."

We will also show that the defendant's conduct in preempting the whole video market for the popular Pac-Man game has already harmed the plaintiff, Atari. Although Atari's game will not be shipped until early next year, Atari is right this minute booking orders by the hundreds of thousands for the Pac-Man game. If the defendant is not preliminarily enjoined, the K.C. Munchkin game will have a serious impact on Atari's introduction of the authorized, licensed Pac-Man game.

The importance of preliminary injunctive relief involving video games was very recently noted in Stern Electronics Corporation against Kaufman out of the Eastern District of New York, your Honor. It is a slip opinion which we attach to our moving papers. I would like to very briefly read one passage from the Stern decision in which Judge Nickerson said and I quote:

"Knock-ups pose a substantial threat to the health of the electronic, video game industry. Development of new game requires substantial investment. It takes between eight months to a year. However, little expense, time or initiative is required to reproduce a game's programmed memory."

1 not be possible. Preliminary injunctive relief is the only  
 2 effective means of protecting a copyright in a video  
 3 game since the life span of a successful game is nearly  
 4 to six months. If knock-ups dilute a copyright's profita-  
 5 bility during that period, a final adjudication in favor  
 6 of the copyright owner will do him little good."  
 7 For purpose. And finally, your Honor, we will show that due to  
 8 the immense popularity of the Pac-Man home-video game and  
 9 the degree of similarity between the games, confusion and  
 10 deception are occurring at the retail level.

11 Indeed, the evidence will show that the defendants  
 12 themselves anticipated that confusion and expected that there  
 13 would be relationship evident to the retail trade and consumers  
 14 as a result of the similarities in the games. the affidavits  
 15 already. And so we would submit, your Honor, that applying  
 16 the well known standards governing application for preliminary  
 17 relief, that is, likelihood of success, irreparable harm and  
 18 the balance of hardship, that we have shown that the plaintiffs  
 19 are entitled to preliminary relief.

20 The defendants' conduct in designing its game, in  
 21 adopting a similar format, in going to the copyright owner,  
 22 Midway, and requesting a license but being told that the  
 23 plaintiff Atari had already obtained the license, that all  
 24 of this evidence will demonstrate that it was a calculated,  
 25 conscious decision on the part of the defendant that should

1 not be permitted to succeed.

2 Your Honor, I would like to hand up at this time  
3 to the Court copies of the documentary exhibits we intend  
4 to refer to during the plaintiffs' presentation. We have  
5 discussed with counsel for the defendants their objections  
6 to these documents. In most cases there are no objections  
7 for purposes of this hearing. I have agreed with counsel  
8 that those objections that do exist can be interposed at  
9 the appropriate times when we formally offer each of these  
10 documents as we go through our presentation.

11 Your Honor, the plaintiffs are ready to proceed.  
12 As I indicated to your clerk yesterday, we hope to put our  
13 evidentiary matters on in a very short period of time. We  
14 don't intend to put on everything that is in the affidavits  
15 already of record. We simply intend to highlight those  
16 significant parts of the evidence that will demonstrate  
17 similarity, the harm to Atari and the need for injunctive  
18 relief.

19 THE COURT: All right.

20 MR. ANDERSON: Thank you, your Honor. First, counsel  
21 referred to a test of copyright infringement in terms of  
22 what is derived. I submit that the test is not what is  
23 derived. The test is in the statute. The test is one of  
24 copying. The term "derivation" or "derived" has a different  
25 meaning, as I think will come out in the course of these

1 proceedings.

2 More importantly, counsel relies on a New York  
3 case where there was a knock-up and the Court criticized  
4 knock-ups. A knock-up is not just a copy of a part, not  
5 just the use of an idea. It is a tearing apart and copying  
6 circuits, parts, complete displays in every respect. I am  
7 sure even counsel will agree that this is not a case of a  
8 knock-up. This is a case of a different game in which, we  
9 submit, the plaintiffs are asserting a right, a claim in  
10 the idea, not even the expression of the idea, which is  
11 protected under the copyright laws.

12 Next counsel has suggested that there has been  
13 confusion and deception and I believe that counsel will fail  
14 in his efforts to prove any such confusion and deception.

15 With respect to the cases, counsel chooses to rely  
16 on the Stern case out of New York, while ignoring the really  
17 two important cases here.

18 THE COURT: Which Court in New York?

19 MR. VITTUM: The Eastern District, Your Honor, Judge  
20 Nickerson.

21 THE COURT: The trial court?

22 MR. ANDERSON: The trial court in New York, your Honor.

23 There are two cases that belie plaintiffs' position  
24 here and they are key to this whole story, I believe and in  
25 those cases, one decided by Judge Decker here in the

1 case and the other, the Universal case, show that in this case  
2 plaintiffs have no standing whatsoever. In the first case,  
3 it was Midway Manufacturing Company, the plaintiff here vs.  
4 Universal Company, the Central District of California, Judge  
5 Waters, decided July 24, 1980. The second is Midway Manufac-  
6 turing vs. Artic International Incorporated.

7 THE COURT: What did that involve, the same copyright?

8 MR. ANDERSON: Different games, different copyrights  
9 and I think in both cases the game was called Galaxian, if I  
10 am not mistaken. Midway vs. Artic was decided by Judge  
11 Decker where he refused summary judgment for copyright infringe-  
12 ment and refused an injunction. That was decided June 2, 1981.

13 Now, for the test of infringement, which is all  
14 important at this hearing today, because we submit plaintiffs  
15 cannot make out a prima facie case of infringement, cannot  
16 even make out a likelihood or a probability of success when  
17 this case goes to trial. Judge Decker, in Artic, dealing  
18 with Midway's Galaxian game had the following to say in  
19 refusing Midway's motion:

20 "Put another way, plaintiff has apparently  
21 attempted to copyright the audio and visual expression  
22 of its game. Thus, for example, it may have copyrighted  
23 the shape of the aliens, what they looked like and how  
24 they moved. Certain other aspects of the game, of course,  
25 cannot be copyrighted. For instance, plaintiff cannot

1 copyright the idea of sending aliens in outer space and  
2 having them swoop down on a flagship."

3 In that case, Midway lost in a motion similar to  
4 a motion for summary judgment but based on a theory such as  
5 they are presenting here today.

6 In the Universal case, Midway's copyright on Galaxian  
7 was also involved. They were again seeking preliminary relief  
8 and in that case, the case did not involve the slavish copying,  
9 the knock-up, that I referred <sup>to</sup> and counsel has relied on, but  
10 the accused made some changes and Judge Waters there said:

11 "Cosmic Alien, the accused game, and Galaxian  
12 have the same general elements. Each game features a  
13 display of aliens which move in formation and drop  
14 missiles aimed at a ship controlled by the player. Each  
15 game also features aliens which break out of the forma-  
16 tion and invert and swoop down to attack the player's  
17 ship. Both games feature a star-patterned background.  
18 While the formations taken by the figures in each game  
19 are similar, the shapes and the colors displayed in each  
20 game are somewhat different.

21 The defendant and counter-claimant have pro-  
22 duced evidence which tends to show that Cosmic Alien  
23 was the product of independent creation."

24 Concluding, Judge Waters said:

25 "Counter-claimant has raised serious questions

1 on the merits of plaintiff's copyright claim, which  
2 are a fair ground for litigation. Many of the elements  
3 of Galaxian, for which plaintiff seeks copyright protec-  
4 tion are general principles of the game and are, therefore,  
5 unprotectable.

6 Plaintiff's copyrights are not infringed simply  
7 because Cosmic Alien is in outer space and has aliens  
8 which swoop to attack the player's ships."

9 These are cases involving Midway. Midway chose  
10 to attach to some of their motion papers other cases but not  
11 the two cases that really go to the heart of the issue here.

12 The statute, of course, is equally clear. I don't  
13 want to take the Court through the statute but the section,  
14 of course is 17 USC 102(b) which says specifically that a  
15 copyright does not extend to an idea, a procedure, a practice,  
16 a system, a method of operation, a concept, a principle or a  
17 discovery.

18 Now most of those terms apply to whatever is involved  
19 in this case here today, your Honor.

20 THE COURT: Well what do you mean by the stipulation that  
21 I just read rather quickly, the stipulated facts that the  
22 audio -- the validity of the copyright in suit is not  
23 contested for the purpose of this hearing? What you just said  
24 suggested to me that that seems to be one of the basic questions.

25 MR. ANDERSON: Your Honor, I think you have put your

1 finger right on the point. The copyright, if it covers  
2 anything, covers the audio-visual presentation, not the idea,  
3 not who is shooting at who, not whether it is in outer space,  
4 not whether one figure is eating another, those are the ideas,  
5 those are the concepts of the game. Those have to be available  
6 to the public. That is like trying to protect the theme of  
7 Abie's Irish Rose which was one of the litigated cases where  
8 a second writer used the two Jewish, Irish fathers as text  
9 and they said you can't protect that concept.

10 The same is true with Superman. There was a case  
11 just recently cited by Judge Motley in which someone tried to  
12 enjoin The Greatest American Hero movie that came out within  
13 the last year, I believe, and Judge Motley said that you can't  
14 protect the concept of a superhuman being jumping over  
15 buildings, bending steel bars in his hands and having x-ray  
16 vision. This is all I am trying to say. The copyright is on  
17 the specific expression, which you see with your eyes, what  
18 you hear with your ears. The issue is whether we have copied  
19 that or not, not whether we have used a concept that has got  
20 to be available to everyone or we would narrow the available  
21 shield of use and application of concepts generally.

22 THE COURT: All right.

23 MR. ANDERSON: Now with respect to infringement, your  
24 Honor, and you can tell from that introduction where we are  
25 going on the facts, we will show that the game called

1 K.C. Munchkin is totally different in play, in audio sound,  
2 in visual presentation, even in the details of just how it is  
3 played. That most that can be said is the idea, the concept  
4 of a maze game, a maze chase game, or maybe eating some dots,  
5 although different dots, that concept you may find in both  
6 but that concept can't be protected.

7 The man that was primarily responsible for developing  
8 our game will be our first witness and he can tell you that  
9 far better than I can.

10 The point is, we submit, for this purpose today,  
11 plaintiffs can't even approach the standard for a preliminary  
12 injunction and that is important because we are on the market  
13 with K.C. Munchkin. It is a cartridge and this will be  
14 clearly shown, it is a cartridge that plugs into a product  
15 called a console sold by our client, North American Phillips.  
16 The cartridge will only plug into the console. The console is  
17 not accused. We have many other games, for the other cart-  
18 ridges that plug into the same console. None of those  
19 cartridges, including the K.C. Munchkin cartridge, will plug  
20 into the Atari console. So when we sell a cartridge, it is  
21 not taking away a sale of a cartridge from Atari at all. And  
22 the suggestion of course -- the plaintiffs know this -- and  
23 are trying to build their flank to prevent this obvious  
24 result that they can't be damaged or significantly damaged  
25 by our continuing to sell and they will say, "Well, once the

1 bloom is off, that's it." Well we have witnesses that will  
2 address that subject, too. ~~terribly impossible to find them~~  
3 ~~right now.~~ Midway, who sells the Pac-Man arcade game sitting  
4 over there, doesn't sell cartridges, doesn't sell consoles,  
5 is not in competition with our client at all. Therefore, it  
6 can't be damaged.

7 ~~MR.~~ Certainly money damages, after a trial, will be  
8 more than adequate to compensate all parties. Conversely,  
9 our witnesses will show that to enjoin our client at this  
10 time, to enjoin NAP at this time would be very, very serious  
11 to disastrous in their business at this time, having announced  
12 the game being ready for the market. ~~also of what we filed last~~

13 ~~week.~~ I appreciate the opportunity to address you in  
14 advance so that you understand where we are going. ~~but, I submit~~

15 ~~that having~~ Thank you, your Honor. ~~in order that the Court~~

16 ~~can~~ THE COURT: Mr. Grice, will you come here a moment? ~~conclude~~  
17 Will you hand this file to counsel for the plaintiff and would  
18 you look at this and tell me whether this court file has all  
19 the papers you filed? ~~we are not going to rely on it. We are~~

20 ~~going~~ MR. VITTUM: Yes, Judge. ~~are going to make a record of~~

21 ~~the~~ THE COURT: Because I have serious doubts it does and  
22 I want you to -- ~~on file because any motion like this, the~~

23 ~~comp~~ MR. VITTUM: Your doubt is absolutely correct. We have  
24 a memorandum of law and we have five affidavits in addition,  
25 your Honor. May we supply additional copies? ~~has been~~

1 THE COURT: Yes. The court files are being reorganized  
2 and I guess it would be literally impossible to find them  
3 right now. Mr. Grice, will you take these papers in the  
4 other case? Give me a duplicate copy of all the filings.  
5 Have the defendants filed anything other than the proposed  
6 findings of fact? be marked as an exhibit, offered in evidence

7 MR. ANDERSON: Just that plus the letter, your Honor, that  
8 that accompanied the proposed findings of fact., as I recall,

9 MR. VITTUM: Your Honor, here is a complete file that  
10 will also include what you already have.

11 THE COURT: All right. We filed the memorandum of

12 MR. VITTUM: But it is a duplicate of what we filed last  
13 week. You and also the District Court case from the District

14 MR. ANDERSON: Your Honor, with respect to that, I submit  
15 that having an evidentiary hearing, in order that the Court  
16 can be advised in the facts and the evidence, should preclude  
17 the use of affidavits and I would like to object to any  
18 reliance upon the affidavit testimony. motion.

19 THE COURT: No, I am not going to rely on it. We are  
20 going to have a hearing. We are going to make a record of  
21 the evidence I hear on this motion. I wanted to see the  
22 complaint that was on file because any motion like this, the  
23 complaint can be helpful. You can stipulate that certain  
24 parts of the complaint are accepted as true, especially in  
25 view of the fact, that as I understand, there has been no

1 filing made by the defendants. Is that right?

2 MR. ANDERSON: That is correct, your Honor. I made the  
3 point only because Mr. Vittum indicated that he might or  
4 would rely on affidavits.

5 THE COURT: If anyone wants to rely on any part of the  
6 record, it should be marked as an exhibit, offered in evidence  
7 and I will hear the objections to it if there are any objections  
8 But I just wanted to see what was filed because, as I recall,  
9 there were a number of documents and I don't find them in the  
10 court file.

11 MR. VITTUM: Yes, Judge. We filed the memorandum of  
12 law that had two cases, the Stern case from the Eastern District  
13 of New York and also the Drikschneider case from the District  
14 of Nebraska which upheld and enforced this very same Pac-Man  
15 copyright that is here in suit. That is attached to the  
16 memorandum of law.

17 THE COURT: All right. There is a motion for a temporary  
18 restraining order and a preliminary injunction.

19 MR. VITTUM: That is the motion we are here on today,  
20 Judge.

21 THE COURT: Now do I understand correctly that motion  
22 not been responded to? Is that right?

23 MR. ANDERSON: That is correct, except insofar as we  
24 are responding here today.

25 THE COURT: I know. Well, let me call your attention

1 to the fact this motion contains a paragraph saying that in  
2 support of this motion the plaintiffs incorporate their  
3 verified complaint and supporting affidavit of Charles S.  
4 Paul and so forth.

5 Now it seems to me that if you don't want that  
6 done, there should be something on record objecting to this  
7 and responding to this motion.

8 MR. ANDERSON: Your Honor, it is our understanding you  
9 instructed us not to respond to the motion other than to  
10 prepare for this hearing.

11 THE COURT: Oh, I didn't say that. I don't ever say a  
12 thing like that. I don't tell lawyers how to handle their  
13 case. I don't do that. You get the transcript of what I  
14 said. I didn't say something like that, I am sure of that.

15 MR. WILLIAMS: No, you didn't, your Honor. We suggested  
16 a briefing schedule and you suggested a briefing schedule  
17 would not be necessary.

18 THE COURT: That is a different matter. We are not at  
19 the point where I wanted any briefs, but the question whether  
20 or not the motion should be answered or responded to, that  
21 is a different matter. Maybe I wasn't understood. I didn't  
22 mean to tell you you couldn't answer the motion, object to  
23 it in writing and oppose certain parts of it. I didn't say  
24 that. I did say I didn't want any memoranda which usually deal  
25 with law and we are not at the point of law. I wanted to

1 find out what this was about, which I don't know right now.  
2 I didn't suggest that. *Involved motions on behalf of Midway.*

3 *THE COURT:* What shall we do about the motion of the plaintiffs  
4 with the paragraph that says that they attach or they incor-  
5 porate by reference the verified complaint and supporting  
6 affidavits?

7 *MR. ANDERSON:* Your Honor, I submit that this hearing  
8 is to provide the evidence, the live testimony and the  
9 exhibits that will enable your Honor to make the decision  
10 on the motion.

11 *THE COURT:* All right. *case for trial.*

12 *MR. ANDERSON:* Of course our time to reply to the motion  
13 would not come up until -- *plaintiff's hearing with respect to*

14 *THE COURT:* The record should show there is opposition  
15 to the grant of the preliminary injunction and I will simply  
16 strike, without hearing anything else, the last paragraph of  
17 this motion and this proceeding will not be supported by  
18 affidavit but I will hear evidence.

19 *MR. ANDERSON:* Fine. Thank you, your Honor.

20 *MR. VITTUM:* Let me say our three witnesses are free,  
21 I understand, your Honor, we we are ready to proceed.

22 *THE COURT:* You may proceed now to call your first  
23 witness.

24 *MR. VITTUM:* May I just make one further comment on the  
25 law, since the two cases counsel for the defendant mentioned

1 I think involve a serious misstatement of what they involve--  
2 neither of those cases involved motions on behalf of Midway,  
3 the copyright owner, Judge.

4 THE COURT: All right. Why don't you wait until we that  
5 finish hearing evidence and then we will turn our attention  
6 to the cases.

7 MR. VITTUM: Very good.

8 THE COURT: But first let us hear the evidence.

9 MR. VITTUM: The plaintiff will call Michael Moone as  
10 their first witness.

11 THE COURT: Mr. Moone, come forward.

12 Secondly, MICHAEL JEFFREY MOONE, of in-house program-  
13 called as a witness by the plaintiff, having been first duly  
14 sworn, was examined and testified as follows:

15 THE COURT: Be seated, please, state your full  
16 name and spell your last name. Keep your voice up and  
17 speak directly into that microphone. Keep your voice up.

18 THE WITNESS: My full name is Michael Jeffrey Moone.  
19 The last name is spelled M-o-o-n-e.

20 DIRECT EXAMINATION

21 BY MR. VITTUM:

22 Q By whom are you employed, Mr. Moone?

23 A Atari, Incorporated.

24 Q In what capacity are you employed by Atari?

25 A President of the Consumer Electronics Division.

1 Q What, generally, is the business of Atari's  
2 Consumer Electronics Division?

3 A Our general business is the manufacture and marketing  
4 of home video games. In layman's terms, these are games that  
5 hook up to your television set in the home.

6 Q How does Atari develop the home video games that  
7 it manufactures and sells?

8 A We develop these games primarily in three formats.  
9 Number one, our coin-operated games division, develops product  
10 that is produced, that is distributed in arcades and bars and  
11 amusement areas. That is one source of development.

12 Secondly, we have a large cadre of in-house program-  
13 mers which develop independent and innovative software.

14 Thirdly, we license software such as games of  
15 Space Invaders and Pac-Man.

16 Q What is the Pac-Man game?

17 A Well, the Pac-Man game, by most records is the  
18 most popular coin-operated game in the industry right now.  
19 It is a game that has very broad appeal for children, adults,  
20 generally speaking, to people of all ages. It is the strongest  
21 and largest selling game in the coin-operated --

22 Q Are you able to identify the Pac-Man game that is  
23 present in the courtroom?

24 A The game I see in front of me on the right is the  
25 Pac-Man game.

1 Q Who developed Pac-Man?

2 A Pac-Man was developed by Namco which is --

3 THE COURT: How will the record show what the  
4 witness is referring to? Do you have some way of doing  
5 that?

6 MR. VITTUM: Why don't we just mark it?

7 THE COURT: Do you have some way of doing that?  
8 He says, "this game in front of me." If someone reads the  
9 transcript they will wonder what the witness is referring  
10 to.

11 THE WITNESS: Your Honor --

12 THE COURT: No. Counsel, why don't you find some  
13 way to have the record show. Mark it as an exhibit.

14 MR. ANDERSON: Your Honor, it is an exhibit we  
15 brought into Court and I would suggest we mark it then  
16 as Defendants' Exhibit No. 1.

17 THE COURT: All right.

18 MR. VITTUM: Your Honor, as long as we are referring  
19 to it in the plaintiffs' case, I will mark it for  
20 identification as Plaintiffs' Exhibit 16 for identification.

21 THE COURT: Let it go like that and then you can  
22 mark it if you want to, again mark it as a defense  
23 exhibit. You may do so then.

24 BY MR. VITTUM:

25 Q Mr. Moone, Plaintiffs' Exhibit 16 is the Pac-Man to

1 which you just referred, is it not?

2 A Yes, it is. Yes.

3 Q Who developed the Pac-Man game?

4 A Namco which is a Japanese company.

5 Q Who puts out the coin-operated Pac-Man game in the  
6 United States?

7 A Midway Manufacturing.

8 Q Mr. Moone, I show you a document that we marked  
9 as Plaintiffs' Exhibit 4 for identification and ask if you  
10 can identify that.

11 A This is a piece of sales literature that was provided  
12 by Midway Manufacturing relative to the introduction of the  
13 Pac-Man game.

14 Q Could you describe the arrangements that Atari has  
15 made with regard to the Pac-Man game?

16 A Yes. In April of 1981 we signed an exclusive  
17 license agreement with Namco for the home video license for  
18 the Pac-Man game.

19 MR. VITTUM: Your Honor, I think this is as good  
20 a time as any to get into the record the Certificate  
21 of Copyright Registration, Plaintiffs' Exhibit 1 for  
22 identification, the Plaintiffs' Exhibit 2 for identifi-  
23 cation, which is a certified copy from the Copyright  
24 Office of the assignment from Namco to Midway of the  
25 Copyright Registration, and Plaintiffs' Exhibit 3 for

1 identification which is the license, exclusive license,  
2 to Atari from Namco-American to which Mr. Moone has  
3 testified. I would offer Plaintiffs' Exhibits 1 through  
4 3 at this time.

5 THE COURT: Any objection?

6 MR. ANDERSON: Your Honor, no objection at all, for  
7 the purpose of this hearing but we had no opportunity  
8 to check with the Copyright Office or to do any investi-  
9 gating whatsoever so I would like to reserve any objec-  
10 tion beyond this hearing.

11 THE COURT: Just for the purpose of this hearing,  
12 with that understanding, they are admitted in evidence.

13 You may proceed.

14 (Said exhibits, so offered, were received  
15 in evidence as Plaintiffs' Exhibit 1, 2  
16 and 3.)

17 BY MR. VITTUM:

18 Q. What is <sup>the</sup> present status of Atari's Pac-Man product,  
19 Mr. Moone?

20 A. At present, we are beginning what in the industry  
21 is known as a manufacturing cycle. We are procuring raw  
22 materials. We are beginning our manufacturing, our preproduc-  
23 tion runs and we are also developing new advertising campaigns,  
24 relative to Pac-Man, with our agency, Doyle, Dane, Burnham.

25 Q. Have you run any advertising for the Atari Pac-Man

1 at present? could you describe the extent of Atari's financial

2 A Yes. In fact we have run print advertising relative  
3 to the introduction of the Pac-Man cartridge.

4 Q Directing your attention to Plaintiffs' Exhibit 5  
5 for identification, are you able to describe what that is,  
6 sir? covering, manufacturing, preproduction, creative, is

7 A What I have in front of me is an Atari ad that  
8 appeared in newsprint of consumer and trade publications and  
9 relative to the variety of software, including the new intro-  
10 duction of the Pac-Man Atari cartridge.

11 Q What about television advertising of the Atari Pac-Man  
12 cartridge? sir?

13 A We will begin our television advertising in approxi-  
14 mately two weeks. if you might, by reference to Plaintiffs'

15 Exhibit Q When will Atari begin selling its Pac-Man cartridge?

16 A Well it isn't a question of beginning. We have  
17 already begun selling the cartridge. In fact, we have booked  
18 orders, to this date, in excess of one million cartridges.

19 Q What is the dollar sales value to Atari of that  
20 figure of in excess of one million cartridges? if you will

21 A The dollar sales value is in excess of 24 million  
22 dollars. Simply put, it is the largest selling cartridge in  
23 the history of our company.

24 Q And you haven't even brought it out yet? sir

25 A No, and the order count keeps rising every day.

1 Q Would you describe the extent of Atari's financial  
2 commitment to licensing, engineering, advertising and promotion  
3 of its Pac-Man cartridge for the home video market?

4 A Conservatively speaking, we have expensed slightly  
5 over 1.5 million dollars to date. This would include  
6 engineering, manufacturing, preproduction, creative, in which  
7 terms of advertising as well as marketing and sales promotion.  
8 That number keeps climbing every day and will exceed five and  
9 a half million dollars by January of this year -- pardon me --  
10 by January of 1982.

11 Q Are you familiar with the Pac-Man coin-operated  
12 video game, sir?

13 A Yes, I have played it several times.

14 Q I wonder if you might, by reference to Plaintiffs'  
15 Exhibit 4, the brochure which you described, just very  
16 briefly describe the principal characters of the game and  
17 the manner in which it is played.

18 A The principal characters, to begin in terms of  
19 appearance, there is a Pac-Man who is a character who moves  
20 about the game and munches dots. The bad guys, if you will,  
21 in the game, are the ghosts. There are ghosts that move  
22 around the screen.

23 In terms of the key game elements, the Pac-Man  
24 munches dots, he scores points, he munches power pills and  
25 when he munches a power pill, he is able to reverse the role.

1 That is very important in the game play because prior to  
2 that, he is being pursued by ghosts. Once he munches a dot,  
3 he can then, in turn, pursue the ghosts. The ghosts turn  
4 blue. He can pursue them and capture them and score bonus  
5 points.

6 It is a maze game and it also offers a feature which  
7 in coin-operated terminology is called a wraparound. It allows  
8 the Pac-Man to move out of the maze for a temporary period of  
9 time. It is a defense mechanism, essentially.

10 Q Are you aware of a home video game known as K.C.  
11 Munchkin?

12 A Yes, I am.

13 Q When did you first hear about it?

14 A I first became aware approximately 14 days ago in  
15 an airplane flying to New York. I would say my awareness  
16 was more of a shock level. As soon as I got off the plane  
17 I called Mr. Skip Hall, our General Counsel. I was very  
18 disturbed, for obvious reasons. I think it is Pac-Man.

19 Q I will show you, Mr. Moone, a document which we  
20 have marked as Plaintiffs' Exhibit 6 for identification and  
21 ask you if you are able to identify that.

22 A Yes. This is a copy of the advertisements which  
23 I saw in Newsweek Magazine approximately two weeks ago.

24 Q Have you seen and played the K.C. Munchkin game,  
25 Mr. Moone?

1 A Yes, I have.

2 Q I show you an object which has been marked as  
3 Plaintiffs' Exhibit 7 for identification and ask if you  
4 are able to identify that.

5 A This is what is termed as a game cartridge, a  
6 video game cartridge. Its method of operation is it is  
7 hooked up to a video game player which, in turn, hooks up  
8 to a television set.

9 The consumer in this instance would play the  
10 game with what we call a joy stick. It is a controller in  
11 which they can move the characters in the game.

12 Q What was your reaction to the K.C. Munchkin game  
13 when you first actually played the game, sir?

14 A My reaction was it was Pac-Man. It is the same  
15 game I had played before in the arcades and it was the same  
16 game we are marketing currently at Atari.

17 Q In what respects did you find the K.C. Munchkin  
18 game similar to the Pac-Man game you knew?

19 A In several respects. One, the appearance, the  
20 appearance of the maze itself, the appearance of the characters,  
21 the fact that the Pac-Man and this other character munch dots  
22 in the same fashion, the fact that there are ghosts which are  
23 what I consider a strong similarity, the fact that the power  
24 pills are blue, that they are located <sup>in</sup> the same area of the  
25 game, that when the Pac-Man munches the power pills in both

1 games, the ghosts turn blue.

2 In terms of the characters, I think appearance and  
3 characters answer together. Game play, one is a maze game.  
4 The object of the game is munching dots and power pills and  
5 reversing the role -- in other words, instead of being the  
6 pursued, he becomes the pursuer. It has a wraparound feature.  
7 I consider those to be strong similarities. In terms of  
8 scoring, the scoring elements are the same or very similar  
9 and in terms of strategy, the strategy I consider to be very  
10 similar. There is a strategy that allows the opponent to hide  
11 in a corner, so to speak, and lure the ghosts into the corner,  
12 swallow a dot or a power pill and immediately turn around  
13 and capture that ghost for bonus points.

14 Q Mr. Moone, are you familiar with a video tape that  
15 has been prepared to illustrate the audio-visual play of the  
16 two games?

17 A Yes, I am. I was involved with the production of  
18 that video tape.

19 Q I show you a cassette marked Plaintiffs' Exhibit 8  
20 for identification and I ask if you are able to identify that.  
21 Yes, this is the tape that I was involved with.

22 MR. ANDERSON: Your Honor, I would like to object  
23 to this tape, whatever it is. If we are going to be  
24 told anything about either game, it seems to me that we  
25 ought to use the best possible evidence which is the

1 games themselves. I have no idea when the tape was made,  
2 how it was made. I had no chance to participation in its  
3 preparation.

4 THE COURT: Well let's see what it is.

5 MR. ANDERSON: I think we should have the games and  
6 not some video tape.

7 MR. VITTUM: Your Honor, those are all matters of  
8 cross examination. Mr. Moone is familiar with how the  
9 tape was made.

10 THE COURT: That objection will be overruled. Let  
11 him show that.

12 BY MR. VITTUM: This is shown in which I have to confess

13 Q Mr. Moone, I would like you to come down and stand  
14 next to the video monitor if you would, and describe for the  
15 record what is shown when that tape begins running.

16 First of all, as a preliminary matter, let me ask  
17 you if you find that the tape accurately and truly depicts  
18 the Pac-Man coin-operated video game and the K.C. Munchkin  
19 video game.

20 A Yes, I do.

21 MR. VITTUM: Can we start the tape, Mr. Ritchie?

22 This is Mr. Ritchie of our office, your Honor.

23 BY THE WITNESS:

24 A Your Honor, this is the Pac-Man tape which we are  
25 going to show first.

1 MR. VITTUM: Your Honor, the tape can be stopped  
2 if you have any questions at any point so we can get  
3 further descriptions.

4 THE COURT: In what way does this tape differ from  
5 Plaintiffs' Exhibit 16?

6 THE WITNESS: It involves the game played, your  
7 Honor. The colors are identical. This little exit

8 or tunnel. THE COURT: Well do I understand correctly that  
9 this tape is a tape of what goes on, on Plaintiffs'  
10 Exhibit 16? First let me tell you something, I have  
11 never played any electronic game. It isn't often that  
12 something like this is shown in which I have to confess  
13 almost complete ignorance about the fact itself. I  
14 have never played an electronic game. I have seen them.  
15 I have seen some of these in airplane terminals and in  
16 game rooms but I had no inclination to look at them so  
17 I am entirely unfamiliar with it and that is why I am  
18 asking. Does this tape come from what is on Plaintiffs'  
19 Exhibit 16?

20 THE WITNESS: Your Honor, this tape comes from  
21 this game, this particular game and the second tape  
22 that we will show you, the Munchkin tape, comes from  
23 this particular game (indicating).

24 THE COURT: All right.

25 THE WITNESS: This is what you would play in the

1 airport or in an amusement parlor or arcade and this is  
2 the game that one would have in the home, this particular  
3 product right here (indicating).

4 THE COURT: Let us proceed, then.

5 BY THE WITNESS:

6 A All right. The similarities are the fact that it  
7 is a maze game. The colors are identical. This little exit  
8 or tunnel, if you will, is what is called a wraparound. Notice  
9 the dots. Notice the flashing dots here (indicating). These  
10 are called the power pills.

11 This character (indicating) is the Pac-Man. He is  
12 moving around. He is munching dots. As he is munching dots,  
13 he is scoring points. Notice, he is trying to evade the  
14 ghosts. He was just captured by a ghost, he deflated, sort  
15 of came apart.

16 He is now munching more dots. He is moving through  
17 the maze. He captures a power pill. Notice all the ghosts  
18 turn blue. He just captured this one and eyes go back to the  
19 center.

20 He continues to move through the maze. The Pac-Man,  
21 again, is munching the dots. He has just captured another  
22 power pill. He pursues the ghosts. He is just thwarting these  
23 two ghosts for double bonus points.

24 He continues through the maze, again munching the  
25 dots. He has been captured, he deflates.

Again, the Pac-Man comes through the maze going toward another power pill, continuing to move. Again the object is to eliminate the dots within the maze and also navigate around the maze away from the ghosts. All right. He has just scored a rack. The game flashes four times and now the speed of the game picks up in terms of the ghosts and in terms of the Pac-Man.

The power pills, again, are in the four corners that are flashing. He is trying to munch power pills so that he can capture ghosts and munch one and they turn blue.

Again, he is moving his way around the maze. He is in pursuit. He deflates. He has been captured. The game is over.

This is played, your Honor, by what we call a joy stick, a joy stick controller and this, in layman's terms is also called a joy stick controller. The player is activating those situations.

This is a game called K.C. Munchkin. This, again, is a maze game. That was a ghost. Notice, your Honor, the power pills which are located in the four corners as we saw in the previous game.

Notice the Pac-Man, the way he opens his mouth, he gobbles the dots, the same as we saw in the previous game.

Again, he is negotiating a maze. This is the wraparound (indicating) as you saw in the previous game. He

1 is moving through the wraparound. Again he is munching dots,  
2 a power pill. Notice how the ghosts in this case turn blue,  
3 which is exactly the situation in the other game.

4 Again, he is maneuvering around the maze trying to  
5 munch all the dots and all the power pills. Just use the  
6 wraparound, it comes back on the screen.

7 Now again, the game flashes four times and in this  
8 game, as well as the previous game, the speed now picked up  
9 in the second round.

10 So we see the Pac-Man move through munching more  
11 dots, another power pill that turns blue. As in the other  
12 game, when they are captured, they move back to center position.  
13 He is moving through the maze, munching more dots as he goes.  
14 As he catches this dot, notice how they turn blue as in the  
15 previous game.

16 He continues to move through the maze. Again, the  
17 similarity, the wraparound features. When he is captured,  
18 he deflates, the same as we saw in the previous game.

19 There we have Mr. Pac-Man moving around. Notice  
20 he is caught again, he is deflated. As in the previous game,  
21 we have three attempts. There he is moving through again in  
22 pursuit of power pills and in pursuit of dots, again maneuver-  
23 ing through the maze. Again he scored all the dots, it racks.  
24 it flashes four times as we saw in the previous game. The  
25 speed again picks up and the Pac-Man moves through the maze,

1 munching dots and power pills. Again, whenever there is a  
2 power pill munched, the ghosts turn blue in both games and  
3 in both games the ghosts refer back to the center position.  
4 Again, he scored a rack, it flashes four times as happened  
5 in both games and again the speed accelerates. You just saw  
6 the wraparound feature.

7 Q Mr. Moone, could you now describe what is going  
8 to be shown on the next portion of this video tape, Exhibit 8  
9 for identification?

10 A The next portion are stills, your Honor, which deal  
11 in more specific details in the similarities of the two games.

12 MR. ANDERSON: Again I would like to object, your  
13 Honor, to the stills. We have not had an opportunity to  
14 participate.  
15 They are ex parte.

16 MR. VITTUM: It is our case, your Honor.

17 THE COURT: This is a motion for preliminary injunction.  
18 This is not a trial of the issues on the merits. This is  
19 a motion for preliminary injunction.

20 THE WITNESS: Your Honor, these again --

21 THE COURT: There is no way you can proceed with  
22 complete discovery on a motion for preliminary injunction.

23 BY MR. VITTUM:

24 Q Mr. Moone, could you describe how the time sequence  
25 of the slides appears on the tape?

THE COURT: The objection will be overruled. Let us

proceed. I will bear in mind this is without your having had an opportunity to see this before. Let us proceed.

BY THE WITNESS:

A These slides I am going to show your Honor were of filmed these two games, these two exhibits.

THE COURT: By these two, that is Exhibit 16, and what is the other one? Have you got the other one?

MR. VITTUM: The other game, your Honor, is the same as the K.C. Munchkin cartridge that we have identified as Plaintiffs' Exhibit 7.

THE COURT: All right. As long as the record --

MR. ANDERSON: I presume, your Honor, that the witness speaks -- these are the actual things. These are our exhibits that the witness has just referred to.

THE COURT: How how does it happen that the defendants will bring all the exhibits in court and the plaintiffs are using them? Is that what you are telling me?

MR. ANDERSON: Yes.

MR. VITTUM: We have the games here as well, your Honor.

THE COURT: But counsel is suggesting to me anyway that he brought some exhibits in court and you are using them. Did you have some understanding to do that?

MR. VITTUM: Well we have the same equipment that the defendants have brought, your Honor, and it seemed

unnecessary to put two of the Pac-Man arcade games side by side.

THE COURT: That is all right. I just asked if you had an understanding.

MR. VITTUM: Yes, we discussed this morning that both of us were going to bring these games over.

THE COURT: They can be marked Plaintiffs' Exhibits and then afterward you can mark them as Defendants' Exhibits although they would be the same ones.

MR. ANDERSON: This really goes to my objection to the use of the video tape and the slides and this prepared material, your Honor. It obviously wasn't made on these machines. I presume it was made on some machines like it but they could have been adjusted in many different ways.

MR. VITTUM: That is all subject to cross examination, your Honor.

THE COURT: Let us proceed. The objection will be overruled. It is for the purpose of this hearing.

BY MR. VITTUM:

Q You might identify when the two slides change, also.

A Your Honor, the first slide is the similarity of the game itself with the maze. We have a maze in both situations. We have a Pac-Man in both situations. We have wrap-arounds in both situations, the same style controller and the

1 maze is colored blue. It is a blue maze in both situations.

2 MR. ANDERSON: Your Honor, I just must object again.

3 THE COURT: Just a minute. Go ahead.

4 MR. ANDERSON: The reproduction is so small and  
5 again --

6 THE COURT: Just a minute, now.

7 MR. ANDERSON: And made in a manner I don't understand.  
8 If the Court will just take the time to look at the Pac-Man  
9 game sitting over there, it looks nothing like this  
10 blurred, vague, partial, indistinct image that is on the  
11 right side of that screen.

12 THE COURT: I understand. I understand. What is  
13 the purpose of putting this into the record? What are  
14 you trying to establish?

15 MR. VITTUM: For two reasons, your Honor. One is  
16 to demonstrate the similarities in the games and also,  
17 we want to make a record so that for the purposes of  
18 any Appellate review, there will be an indication of what  
19 was before this Court.

20 One of the difficulties in relying on the  
21 physical exhibits like an arcade game or the home video  
22 game itself is that they do not retain a record of what  
23 the Court saw of these transitory audio-visual images  
24 which is the subject of the copyright.

25 THE COURT: The objection will be overruled. As I

1 understand it, what you have done, you have taped, on the  
2 left-hand side as I am viewing this television screen --

3 BY THE WITNESS: Yes, your Honor.

4 THE COURT: -- is the K.C. Munchkin game.

5 THE WITNESS: Yes, your Honor.

6 THE COURT: And you taped, I take it, it is what one  
7 visually sees of the Pac-Man game when it is being played.

8 THE WITNESS: Yes, your Honor.

9 THE COURT: You are doing that for the purpose of  
10 showing the similarities?

11 THE WITNESS: Yes, your Honor.

12 THE COURT: Is there any claim here by the plaintiffs  
13 that the one that I am looking at to the left, which is  
14 the K.C. Munchkin game is a copy of the one to the right,  
15 that is the Pac-Man game? Is there any such claim or  
16 is this just to show what appears to be similarities?

17 MR. VITTUM: Similarities.

18 THE WITNESS: Similarities.

19 THE COURT: All right. With that understanding, let  
20 us proceed.

21 BY THE WITNESS: The Pac-Man continues to, is a part of open

22 A Now the next slide, your Honor, shows the ghost, if  
23 you will, the similarity in the characterization of the ghost,  
24 the similarity in the characterization of the Pac-Man in the  
25 location of power pills. Again, the power pills are in the

1 four corners in both games.

2 THE COURT: I see.

3 BY THE WITNESS:

4 A Now your Honor, we see the game in operation. We  
5 see the Pac-Man in this game coming down and munching dots  
6 and we see the Pac-Man in this game coming down and munching  
7 dots (indicating).

8 THE COURT: All right.

9 BY THE WITNESS:

10 A In the next slide, your Honor, we see the Pac-Man  
11 is luring a ghost into the corner. In both situations, this  
12 is a key strategy in terms of reversing the roles, going from  
13 the pursued to the pursuer.

14 We now see that the Pac-Man has munched a dot.  
15 Notice that everything is turned blue, all ghosts in both  
16 cases have turned blue and now the Pac-Man has become the  
17 pursuer versus the pursued.

18 In this slide we see that the Pac-Man has captured  
19 a ghost. Notice how the eyes of the ghost revert back to the  
20 center in both games. The captured ghost goes back to the  
21 center position. The Pac-Man continues to, in a sort of open  
22 clam fashion to munch his way through the maze.

23 We now see the wraparound feature. In both situa-  
24 tions, the Pac-Man is exiting the maze through the wraparound  
25 tunnel or channel, if you will.

1 ordinary All right. We now see the Pac-Man coming back in  
2 from the wraparound feature in both situations. The Pac-Man  
3 is coming back in the left-hand corner on both games. Again,  
4 the dots and power pills in location and the relativity of  
5 the ghost. or, based on your own playing of these tapes?

6 A In this situation we see the Pac-Man being eaten  
7 by a ghost or captured by a ghost and we see the same situation  
8 over there as well (indicating). Again, the ghost -- or the  
9 Pac-Man deflates whenever he is captured by a ghost. And  
10 for point And in this situation, there are the flashing lights  
11 when the game is completed. The maze in both situations is  
12 void of dots. Both games flash four times and at the end of  
13 those games when the game starts up again, the speed is  
14 accelerated in both situations. It is a shorter game.

15 Q And those, your Honor, are the similarities we wanted  
16 to show. And there is some fallback, there are some weaknesses

17 BY MR. VITTUM: (indicating), and regardless of who the

18 Q Will you resume the stand, Mr. Moone, unless the  
19 Court has any further questions. After the game play whatever.

20 THE COURT: No, no. The game always use the same

21 BY MR. VITTUM: (indicating)

22 Q Mr. Moone, when the video tape was performed and  
23 the images were taken on the video tape camera from both the  
24 Pac-Man game and from the K.C. Munchkin game, will you  
25 describe whether there were any adjustments made out of the

1 ordinary way in which those images appeared on the screen?

2 A No, none whatsoever.

3 Q Did you note any differences between the two games,  
4 the Pac-Man game on the one hand and the K.C. Munchkin game  
5 on the other, based on your own playing of these tapes?

6 A Yes. Playing the two games, there are some differ-  
7 ences in the real -- in the finished Pac-Man game, the dots  
8 are stationary. In this Munchkin game, the dots move. But  
9 the object or the strategy is the same. It is to munch dots  
10 for points and to munch power pills so that you can turn around  
11 and pursue the ghost. There are vague similarities and it  
12 is the conversion of a coin-operated game to a home video game.  
13 Not to bore your Honor, but there is much more computer memory  
14 in this game over here (indicating). It is a smarter game.

15 Q Exhibit 16.

16 A And there is some fallback, there are some weaknesses  
17 in this system (indicating), and regardless of who the  
18 manufacturer was, there would be some tradeoffs. This is  
19 simply a tradeoff but does not differ the game play whatsoever.

20 Q Does the K.C. Munchkin game always use the same  
21 maze for the plays?

22 A The maze changes but the game play remains the  
23 same. The wraparound features are always there in the maze,  
24 the location of the power pills are always there in the maze.

25 Q Directing your attention to Plaintiffs' Exhibit 6

1 for identification, which is the K.C. Munchkin advertisement  
2 before you --

3 A Right.

4 Q -- the maze that is shown on the television screen  
5 in Plaintiffs' Exhibit 6 is the exact same maze that was  
6 shown on the tape presentation, Plaintiffs' Exhibit 8?

7 A Yes, it is. It is a duplicate.

8 MR. VITTUM: Your Honor, at this time I would  
9 offer into evidence Plaintiffs' Exhibits 4, 5, 6, 7  
10 and 8.

11 THE COURT: Any objection?

12 MR. ANDERSON: I object to Exhibit 8, your Honor.

13 I think it is not the best evidence. We had no opportunity  
14 to participate in its preparation. I also think it is not  
15 representative.

16 THE COURT: You mean it isn't an accurate comparison  
17 of the two games as they go on the screen? Is that what  
18 you are saying?

19 MR. ANDERSON: That is right.

20 MR. VITTUM: Your Honor, that is the subject of  
21 cross examination.

22 THE COURT: I will overrule that objection. You  
23 can show to what extent it doesn't compare and I will  
24 note that. Then all the other exhibits are admitted in  
25 evidence.

1 MR. VITTUM: Thank you. product?

2 (Said exhibits, so offered, were received  
3 in evidence as Plaintiffs' Exhibits 4, 5,  
4 6, 7 and 8.)

5 BY MR. VITTUM: now talked about a variety of cartridges, 40

6 Q Mr. Moone, how is Atari harmed by the K.C. Munchkin?

7 A Well, it is harmed in several ways. Frankly, since  
8 this whole thing started, it has taken personally half of  
9 my time. There are a lot of things I am not doing that I  
10 should be doing, specifically answering phone calls from  
11 valued customers. I never come back and buy Atari. They

12 We could possibly suffer the cancellation of orders  
13 that had been placed. We just brought 142 largest customers  
14 to Atari at our expense to preview the 1982 line. We booked  
15 orders during that period. We advertised. We stated in  
16 print that we are the exclusive -- we have the exclusive  
17 license to Pac-Man. We begin a major promotion in two weeks.  
18 We have begun major promotions with Sears Roebuck, J.C. Penney,  
19 K Mart, and this entire promotion is in jeopardy at this  
20 point.

21 It is not a question of 1982. It is a question of  
22 right now. I have physically been living on airplanes for  
23 ten days since this thing started.

24 Q Could you describe how the introduction of the  
25 K.C. Munchkin game at this time is interfering with your

1 introduction of the Atari Pac-Man product?

2 A Well, dramatically because, first of all, in my  
3 opinion, Magnavox has totally repositioned their advertising  
4 campaign. Anyone who knows anything about advertising -- in  
5 the past they have talked about a variety of cartridges, 40  
6 cartridges. They have never bothered to show a single cart-  
7 ridge. And all of a sudden I'm hit in the face with this  
8 ad that shows Pac-Man and they are clearly positioning this  
9 cartridge as being able to sell their entire system. Now,  
10 how does that attack Atari? Simply put, when someone buys  
11 Munchkin, they will never come back and buy Atari. They  
12 already have, they have a competitive system so they have  
13 preempted us into the marketplace at the most viable season  
14 in the year.

15 Q What information do you have personally, Mr. Moone,  
16 concerning the reaction of Atari's customers to the K.C.  
17 Munchkin introduction?

18 A Personally, in the last week, I have visited Sears  
19 Roebuck & Company who is in the process of writing their 1982  
20 contractual commitments to Atari. There is a serious ques-  
21 tion on their part as to whether or not they can advertise  
22 Pac-Man through Atari, whether or not we have the exclusive  
23 license. They are planning a major promotion on this product.  
24 Last week I met with J.C. Penney Company relative  
25 to the same subject. We are now working with their advertising

agency and our advertising agency. In fact, we are, this week and next week, literally producing the commercial, the story boards for the J.C. Penney-Atari commercial relative to the Pac-Man introduction in March and yesterday I met with the senior executives of the K Mart Corporation and one of the major questions on their mind was, "Do you or do you not have the exclusive rights to Pac-Man because, if you don't, we must seriously consider the commitments that we have made to you." With this impact, no.

Q MR. VITTUM: No further questions, your Honor.

THE COURT: Cross examination.

With this CROSS EXAMINATION

BY MR. ANDERSON: They have advertised specific cartridges

Q Mr. Moone, you just said that Magnavox never bothered to show a single cartridge in its advertising before, do I understand you correctly? Is correct.

A The advertising I have been presented by our agency and that I have viewed as a consumer and as a member of the video tape industry, features a multitude of cartridges in its advertising, the trade and consumer print that I have seen. It is not focused on an individual cartridge, that's correct. MR. ANDERSON: It has not yet been.

Q Do you know what cartridge Magnavox has been featuring during the spring and summer of 1981? Is looking at.

A What I have seen in ads, has been in the middle of

the page, a television set with your client's console underneath and with baseball players, football players and dragons and all sorts of things coming out of the back of the console and that has been the type of print advertising I have seen featured.

Q You do not know if advertising by Magnavox has featured specific cartridges and specific ads in the last year other than K.C. Munchkin?

A With this impact, no.

Q Not quite as much as this, is that what you are saying?

A With this impact.

Q I see. They have advertised specific cartridges but not with as much impact as you feel this ad has as shown in Exhibit 4?

A To my knowledge, that is correct.

Q Now, I would like to show you the magazine Electronic Games for the winter of 1981 and specifically, the ad that follows Page 24 for a game called The Quest for the Rings, a computerised master strategy game by Odyssey 2.

THE COURT: Has that been marked as an exhibit?

MR. ANDERSON: It has not yet been.

THE COURT: Why don't you mark it so the record will show what it is the witness is looking at.

MR. ANDERSON: I will mark that as Defendants'

Exhibit 1, your Honor.

THE COURT: All right. Defendants' Exhibit 1.

MR. ANDERSON: I will mark the whole book.

THE COURT: What page are you referring to of that book?

MR. ANDERSON: The page following Page 24,

THE COURT: All right.

MR. ANDERSON: I think it is number 25. The number does not appear on the page.

THE COURT: All right.

BY MR. ANDERSON:

Q Does that feature --

A No, I would take issue with that because if you turn three pages, that shows every game in your library so I would take issue with that and I will tell you why I would take issue.

THE COURT: Now just a minute now. Let us not have arguments between counsel and the witness. Just put a question to the witness answer the question.

BY THE WITNESS:

A The reason --

THE COURT: Wait a minute. What was the question that was put to Mr. Moone? Would you read the question, Miss Court Reporter? Just listen to the question and answer the question.

Q Is that a (Question read.)?

THE COURT: Had you put the question? What was the question?

MR. ANDERSON: I asked him if he was familiar with that.

THE COURT: All right. Are you familiar with that?

THE WITNESS: Yes.

THE COURT: All right. That over, your Honor.

BY MR. ANDERSON: All of the day.

Q That does feature a game called The Quest for the Rings?

A It features a game called A Quest for the Rings. It is part of, because in any advertising man's terms, this is -- I think it is called a double truck or a multiple insertion but my point is the ad does not stop at this one page. The ad, in fact, covers, one, two, three, four pages. It is not a single page insertion. It is a four-page ad. I, as a consumer, would continue to leaf through this.

BY MR. ANDERSON: All right. I understand that this

Q Do you have the Odyssey ad that you testified about on direct examination in front of you?

A I have -- you have Time Magazine. I have -- the ad I testified to was in Newsweek.

Q That is Exhibit 6. Do you have Exhibit 6?

A I have Newsweek printed on the back of mine.

Q Is that a two-page exhibit?

MR. ANDERSON: Mr. Vittum, I think we had agreed to use a different exhibit than this as Exhibit 6.

MR. VITTUM: That is correct. Has that been brought over?

MR. ANDERSON: You only received part of the exhibit we agreed to. I apologize to you, Mr. Moone.

MR. VITTUM: We brought that over, your Honor, after the start of the day.

THE COURT: All right.

BY MR. ANDERSON:

Q Isn't it a fact that the exhibit is incomplete and, in fact, the whole Odyssey ad includes another portion on the next page that lists all of Odyssey's games?

THE COURT: Let me ask a question. Are you withdrawing Plaintiffs' Exhibit 6?

MR. VITTUM: No, your Honor. I am asking to substitute for it the correct one.

THE COURT: All right. I understand that this exhibit is not complete. There is another page. Mr. Grice, will you give this back? All right. Then let me see Exhibit 6.

Mr. Moone --

THE WITNESS: Yes, your Honor.

THE COURT: All right.

MR. VITTUM: Let the record show, with the Court's permission, I am remarking a new Exhibit 6.

THE COURT: All right. Let me make a little simple suggestion. Why don't you describe that Exhibit, that Newsweek Magazine of a certain date.

MR. VITTUM: Let me do that, Judge. It is November 16, 1981 Newsweek Magazine. It is Pages 126 and 127 --

THE COURT: All right.

MR. VITTUM: -- of that issue, your Honor.

THE COURT: All right.

BY MR. ANDERSON:

Q Do you recall the question?

A Yes, and my answer to the question was that I would quarrel with simply saying yes, and the reason I would quarrel with simply saying yes is that the portion of the page merely gives the print mentioned of the additional games versus the very graphic and colorful depiction of a full library of games over here and what I know about advertising says that this has far more significant impact than does this (indicating) People's eyes are attracted by a multitude of colors, not by a few lines of copy over on the other side.

Q Now you testified I think that Atari has in excess of one million cartridges already sold?

A Yes, sir.

Q For displaying the Pac-Man game on the Atari console?

A Yes, sir, that is correct.

Q From your testimony, I understand none of those orders have been cancelled?

A None of those orders have been cancelled. The fact that I have been questioned by the senior management retailers, such as Sears Roebuck, J.C. Penney and K Mart Corporation and had to physically visit with Executive Vice-Presidents, senior merchandise managers et cetera to discuss this issue and the fact that the statement has been made --

THE COURT: Now let me say something here. This record is just going to contain an argument between you, Mr. Anderson, and Mr. Moone.

MR. ANDERSON: I don't mean to argue.

THE COURT: Now Mr. Moone, just listen to the question that is being put to you.

THE WITNESS: Okay.

THE COURT: And just answer that question and then counsel for the plaintiffs will ask you, if there is anything else that needs to be brought out, they will ask you. But the question is a very direct one. Just listen to it and answer the question. Either those orders have been cancelled or they haven't been.

Will you read the question to Mr. Moone, please.

(Question read.)

THE COURT: That is how you intend the question to be put?

MR. ANDERSON: That is exactly how I intended it to be put.

THE COURT: All right. Do you understand the question?

BY THE WITNESS:

A Yes, your Honor. As of this date, these orders have not been cancelled.

THE COURT: All right.

BY MR. ANDERSON:

Q Now with respect to the cartridge, the Munchkin cartridge, there is no magnetic tape in that cartridge, is that right?

A No.

Q There is no means of running a picture such as you have run here in this video monitor, is that correct?

A I'm not sure I understand the question.

Q Well what is exactly a home video cartridge?

A A home video cartridge is what engineers call rom.

Q R-o-m?

A R-o-m, read-only memory. It is a semi conductor that is dedicated. First of all, semi conductors have smaller or larger memory, based on numbers. 6 PK has less memory than 32 K. 32 K has less memory than 64 K or we could use reverse

analogy. But, rom is read-only memory. It is a dedicated chip and there is a device called a mask, and chip mask which is sent to the silicon manufacturer and this mask is what creates, if you will, on a production line, on an assembly line basis, the rom that is in that cartridge. It is not a tape that you would find in a video tape recorder cassette or that you would find in a musical cassette. It is not a piece of petroleum base chemical material.

Q Alone, this cartridge called K. C. Munchkin, can do absolutely nothing, is that correct?

A That's correct.

Q It has to be plugged into a thing such as we have here on the table and I will have marked as Defendants' Exhibit 2, a thing called a console, is that correct?

A That is correct.

Q And the console that we have here is a console made by North American Phillips, bearing the name Odyssey 2. Can you see it?

A That's correct.

THE COURT: That is Defense Exhibit what?

MR. ANDERSON: Defendants' Exhibit 2, your Honor.

THE COURT: All right.

BY MR. ANDERSON:

Q Now Mr. Moone, am I correct that you could not even plug the Odyssey 2 Munchkin cartridge into a console

made by Atari?

A That is correct.

Q It would serve no function if you could, is that right, if it were modified mechanically so it would plug in, it still wouldn't do anything?

A To my knowledge, physically, it would not fit in the Atari machine. From an engineering point of view, it would not work.

Q Because it would not fit and also because it just would not work electronically and logically?

A Yes.

Q So there is no way anyone will ever buy an Odyssey 2 Munchkin, K. C. Munchkin cartridge, to plug into an Atari console, is that correct?

A No, I can't -- I would disagree with that, by the fact that retailers Toys-R-Us specifically have had to code their aisles relative to inventory by specific manufacturers because consumers have been so caught up in this video game frenzy that they had, in fact, purchased cartridges unwittingly and placed them in other machines, not knowing that they didn't fit and that could be substantiated for the record.

Q So you are saying retailers have found they have to label the racks where the Atari cartridges are with the clear name Atari and the racks where the Odyssey cartridges are with the clear name Odyssey?

A In some cases. This was Pac-Man.

Q Because otherwise, the purchaser might inadvertently pick up one that did not fit into his particular console?

A Right. --

Q So the thing that identifies the cartridge for the consumer and whether he can use it in his console or not is, first and foremost the name Atari or Odyssey or whatever and the manufacturer is?

A No. No. First and foremost are the graphics, or the illustrations.

Q The illustrations where?

A The illustrations, different kinds of illustrations, the package illustration.

Q Now you didn't put a corresponding package illustration --

THE COURT: Wait a minute. When you said, "this kind" you were bending over and you were pointing to Plaintiffs' Exhibit 4. All right, proceed.

BY MR. ANDERSON:

Q You were not asked any questions about a similar illustration of a K. C. Munchkin's graphics but only about the ad, Exhibit 6, that has graphics, in the major part of the picture, in forms of simulated Munchkins and munchers and a very tiny picture of the TV display, is that correct?

A Going back to my previous statement, this, when

I first saw this, I said this was Pac-Man.

Q You will agree --

A Visually, I said this was Pac-Man.

Q And you are referring --

A When I saw the screen, when I saw the characters, when I saw the blue maze, when I saw the characters, when I saw the game on the television set that showed the wraparound features, that showed the Pac-Man with his mouth open eating dots, when I saw power pills.

Q How could you tell all of that? As I look as this --

A As a Pac-Man player.

Q On this small screen you could tell all of that as a Pac-Man player, is that right?

A I have 20-20 vision. I can see that the Pac-Man does, indeed, have its mouth open, he is eating dots, it appears he is moving in the direction of the ghost on this screen and I can see in this larger illustration that the Pac-Man has his mouth open and that he is eating dots in this screen right here (indicating), and he is moving through a maze.

Q You see that in the three-dimensional representation in more or less a stylized artist's conception that fills all but the area where the TV set is? Is that what you are referring to?

A Yes.

Q Have you ever seen that kind of a display of characters looking like that on an actual K. C. Munchkin game display?

A These particular characters?

Q Yes, the red and green and gold one there?

A I am not technical enough to say they are on the same scale but the representation that I have seen on the screen is quite similar.

Q I would like to hand you a document that we have been given as Plaintiffs' Exhibit 12, which hasn't been referred to in your testimony but it does appear to have a larger display of the K. C. Munchkin field. Is that how you understand that?

MR. VITTUM: Well, your Honor, I don't know that this witness has seen this particular exhibit. It is a local advertisement from Chicago. He is obviously studying it right now.

THE COURT: See if he recognizes it. If he doesn't, he can say so.

BY THE WITNESS:

A In response to your question the field appears to be a bit larger. I see the Pac-Man with his mouth open about to eat a dot. I see a maze. I see a maze that has wraparound features. I see all the similarities.

BY MR. ANDERSON: - I can only presume they have been eaten.

Q I just asked you if you do believe this represents K. C. Munchkin as you understand it.

A It represents Pac-Man to me. - before the game begins?

Q Not K. C. Munchkin?

A That is correct. - filled with dots?

Q But Pac-Man?

A That's correct. - for the characters to follow in.

Q Now the Plaintiffs' Exhibit 4 in front of you also at the same time, do you have that?

A Yes. - is not true in K. C. Munchkin, is that right?

Q That is a Pac-Man advertisement?

A This is the advertisement from Midway Manufacturing.

This is their piece of sales literature.

Q Would you put Plaintiffs' Exhibit 4 in front of you and Plaintiffs' Exhibit 12 in front of you at the same

time.

A 12, right.

Q Now I would like you to look at Plaintiffs' Exhibit 4.

A Right.

Q The Pac-Man display.

A Right. - Munchkin, the dots never stand still. Is

Q Now it has a complete field of uniformly spaced dots, does it not?

A No. Some of the dots are missing. Some of the

dots have been -- I can only presume they have been eaten. I notice in the Midway, too, on the right-hand side there are no dots whatsoever on this field.

Q Are there when the field is -- before the game begins?

A Before the game begins, yes.

Q All those lines are filled with dots?

A Yes.

Q So every pathway for the characters to follow in Pac-Man is filled with dots?

A Yes, it is.

Q That is not true in K. C. Munchkin, is that right?

A That's correct and I previously testified to that.

Q Yes. Now, the dots in Plaintiffs' Exhibit 4 for Pac-Man are uniformly spaced throughout the field, is that correct?

A That is correct.

Q That is not true in Pac-Man?

A I previously testified to that.

Q And in Pac-Man, all of those dots remained stationary at all times, is that correct?

A That's correct.

Q In K. C. Munchkin, the dots never stand still, is that correct? They move all the time?

A To some degree.

Q To some degree. The speed of those dots varies?

A The speed of the dots varies.

Q And of course the speed of the dots can't vary in Pac-Man because they never move, is that right?

A They are stationary. If I can interject, the dots is not the only issue. As a game player, there is also the location of the power pills. To become proficient at Pac-Man, one must consume power pills before you can turn the tables, so to speak, before you can become the pursuer versus the pursued. The location is the same. The location is always in the corners.

Q The power pills in Pac-Man are large and the same color as the dots, is that correct?

A They are blue -- well, I am sorry, they are not. They are the same color, approximately the same color.

Q They were blue in your visual display that you played out of the tape recording on this Sony monitor, weren't they?

A On that particular monitor?

Q On this particular monitor today when you were telling the Judge how everything was blue, those power pills were blue, weren't they?

A No.

Q They weren't?

A I think what we saw, because of the angle of the camera and I think anyone can appreciate with the angle of

the camera there would be a slight deflection. That is merely a question of optics. So you may have seen some blue. It was merely the bleed from the maze itself over into the dots.

Q Well, when you -- yes, go ahead. I'm sorry.

A I think that to my knowledge that's all it was. I physically watched that game being filmed and it was a question of being able to get up and get the proper angle because that is <sup>a</sup> monitor that is fixed on a stationary object and it wasn't able to move as well as it was able to come and get a frontal view of this game right here (indicating)

Q When your counsel played this TV monitor with your prepared tape, isn't it a fact that everything was blue?

A That everything was blue?

Q There was no red in the picture at all?

A Well, some of the characters are red.

Q On this monitor when your display was being presented, this tape?

A Some of the characters were red. Some of the ghosts were red.

Q Can we run that tape through?

A Sure.

MR. VITTUM: Do you intend the K. C. Munchkin or the Pac-Man game?

MR. ANDERSON: This is fine.

BY MR. ANDERSON:

Q Now what colors do we see in that field right now?

A We see blue. I can see either a sort of yellowish green, sort of a washed out yellow-green.

Q What is that?

A That is the Pac-Man.

Q You mean the Munchkin?

A The Pac-Man.

Q We will get to that. Can you move it either way?

A Now you notice, I just saw an orange one.

Q All right. I admit they all look almost blue to me.

A Well, there is that guy is pink. They turn blue because they ate a power pill. That is what happens in both games. That is the similarity between both games.

Q Isn't it a fact you had the color set to make this very blue?

A No, sir.

Q All right. Back to the two exhibits, Plaintiffs' Exhibit 12 which is the K. C. Munchkin advertisement with a display shown, and Plaintiffs' Exhibit 4?

A Right.

Q Isn't it a fact that there is a maze shown in the Pac-Man display, the visual presentation of Pac-Man, in which all of the maze outlines are double lines with solid areas defined by the double lines?

A That is true. (motion read.)

Q Now that is not true in K. C. Munchkin, is it?

A No. (like a better terminology or definition)

Q The mazes are different in that respect, at least?

A I disagree. (Now Mr. Moone --)

Q They are not different in that respect?

A I disagree because the key to the game is traversing the maze. The fact it is a double line in a single wall maze, you can't go through that narrow lane between the two walls.

Q You mean, the key to the concept of the game?

A Yes, sir, that's right. As I testified earlier, there were certain engineering tradeoffs because the resident memory in this machine prohibits one from making all of those changes or all of those modifications in the home version, but it doesn't make it any easier or more difficult for that matter to traverse the maze. (the question and the answer.)

Q Then it is your testimony, in spite of these various, many differences of the visual display, your contention is K. C. Munchkin uses the concept of Pac-Man? (white noise)

A My contention, with all due respect, is that K. C. Munchkin is not K. C. Munchkin -- it is Pac-Man. (ed. sheets.)

Q Can you answer my question? Would you like it to be read?

A I would, please. (like a white sheet or a)

THE COURT: Read the question to the witness.

(Question read.)

BY THE WITNESS:

Q I would like a better terminology or definition of concept.

THE COURT: Now Mr. Moone --

THE WITNESS: Yes, sir.

THE COURT: Just answer the question and we can go on to something else.

THE WITNESS: All right.

THE COURT: Did you get the answer?

BY MR. ANDERSON:

Q The answer was yes as I understand.

A Yes.

THE COURT: Now help me because I was distracted. Miss, would you read the question and the answer to me? I want to hear the question and the answer.

(Record read.)

BY MR. ANDERSON:

Q Now, just referring to the two exhibits once more, Mr. Moone, just to complete the picture, Plaintiffs' Exhibit 4, the Pac-Man game, shows what you called ghosts, is that right?

A Yes.

Q And they look a little like a white sheet or a colored sheet over someone with two eyes showing?

A Right.

Q Now isn't it a fact that there are no such ghosts that look like a colored sheet or a sheet covering someone in the game K. C. Munchkin?

A Well, what I am looking at on my -- what I see in this black and white copy is something with two eye slits in it that appears to be standing on three legs and what I see in this copy, which is Midway, is something with two eye slits in it that appears to be standing on three legs.

Q Do you see the horns?

A I see a tremendous similarity. I see the horns in this one (indicating).

Q Do you see the munchers have horns, in Plaintiffs' Exhibit 12?

A I see a slight protrusion above the eyes.

Q I would like to show you official rules, Odyssey 2, K. C. Munchkin, which has been marked Defendants' Exhibit 3 and you said, I think you had seen a K. C. Munchkin cartridge, is that correct?

A Yes.

Q And did you actually have it in your possession?

A This particular cartridge?

Q No, a K. C. Munchkin cartridge, not this particular one.

A I had this particular cartridge.

Q And was that cartridge purchased?

A Was that purchased by me? No.

Q Purchased by anyone on behalf of Atari?

A I assume it was purchased by our counsel.

MR. VITTUM: Yes, it was, your Honor.

BY MR. ANDERSON: It is Pages 14 and 15.

Q Did the instruction book come with it?

A Yes. The instruction book.

Q And had you seen the instruction book?

A I read through an instruction book.

Q And was it an instruction book the same as Defendants' Exhibit 3?

A Yes. See here is something that has sort of a

rounded off MR. ANDERSON: Your Honor, may I hand up a copy of Defendants' Exhibit 3 to you?

THE COURT: Yes.

THE WITNESS: Your Honor, would you like to look at it?

THE COURT: This is right here.

BY MR. ANDERSON:

A I would like for you to look at the last two pages, not the back page, but the inside cover and ask you --

MR. KRUPKA: Counsel, could we have a copy of the exhibit? This is one of the ones that was

supplied to us. Your Honor, I am going to object to

Thank you.

BY MR. ANDERSON:

Q Is that what you understand the characters in K. C. Munchkin looked like?

A In which -- I am sorry. Which page?

Q The last two pages. It is Pages 14 and 15.

A No.

Q Of the instruction book.

A No, not at all. What you have is an artist's rendition here and what I have seen is something that has more rounded shoulders, for example.

I see the eyes in neither example but I think clearly what I see here is something that has sort of a rounded or stooped shoulder effect.

Q And you are looking at --

A It is more of a semicircular versus this, which is rectangular. It is a square edge.

Q And you were looking at Plaintiffs' Exhibit 12 and comparing it with Pages 14 and 15 of Defendants' Exhibit 3?

A Of the main print.

Q Do you know how logically or electronically that picture of the muncher is formed on the screen of the TV set in K. C. Munchkin?

A How it is formed?

MR. VITTUM: Your Honor, I am going to object to

that inquiry on the grounds of relevance. It seems to me we are going fairly far afield from the question which is before the Court, which is the similarity of the images of the audio-visual works as they appear on the screen. The technical matter of how that may be formed in an electronic memory or cartridge as opposed to a magnetic tape or even a motion picture film is not before the Court.

THE COURT: I can look at these exhibits and tell the similarities between the screen of the Pac-Man game and the screen of the K. C. Munchkin. I can do that. You can show it to me. I don't think it is necessary to ask Mr. Moone.

MR. ANDERSON: All right.

THE COURT: I will sustain the last objection.

Let us proceed. Could you state for the record what is it that you did that brought that on the screen?

MR. ANDERSON: Yes, indeed, your Honor. I have just pressed the number zero on the keyboard of the Odyssey 2 console, Defendants' Exhibit 2, which caused one particular display to appear on the Odyssey 2 screen.

THE COURT: Is that the display or one of the displays?

MR. ANDERSON: That is only one of the displays, your Honor.

BY MR. ANDERSON:

Q Mr. Moone, is that correct, that is only one of the displays?

A That is correct.

MR. VITTUM: Your Honor, may I have the Court's permission to stand over in the corner so I may watch that?

THE COURT: Surely.

BY MR. ANDERSON:

Q Mr. Moone, is this what you saw when you actually saw a K.C. Munchkin game played?

A Yes, it is.

Q Now I think you have indicated that as you looked at the exhibits of advertising, there was some difficulty in telling just what the characters looked like. Can you tell better from the actual display?

A Yes, I can.

Q All right. Now, to help the Court, this is one mode of playing K. C. Munchkin, is that correct?

A That's correct.

Q Do you know how many modes there are?

A I believe there are seven or eight. I don't know, to be honest. I don't know.

Q All right. We will develop that later.

Now, this gentlemen that comes out here (indicating)

is called the muncher, is that right, the orange one and the red one?

A Those are ghosts.

Q Do you know what Magnavox called them, do you know what Odyssey called them?

A I know them as ghosts.

Q Okay. These colored characters that come out, the red one and the orange one, they have one appearance when they are moving and then as they change, they have horns, don't they?

A At this point they have stooped shoulders. When they turn a corner on an angle, they have a different image.

Q And that image is not used -- that different image is not used in Pac-Man. That is different from anything in Pac-Man, is that not correct?

A Somewhat different.

Q All right. Now are you aware --

A At the same time, prior to turning at an angle, it is the same. It is stopped. That is the same stooped shoulder right there I talked about earlier.

Q Are you aware what is meant by an eight-by-eight matrix in video games?

A No.

Q All right. Now with respect to the blue character that sits above the box --

A Right.

Q -- he is smiling there with horns, isn't he?

A That's correct. ~~four ghosts?~~

Q And there is no smiling character with horns in Pac-Man, is there?

A We are not playing games right now. This is simply what -- ~~THE COURT: You have to answer directly. Answer~~

THE COURT: Now Mr. Moone, I have to interrupt.

Just answer the question.

BY THE WITNESS:

A It is not, that is correct.

THE COURT: Go ahead. ~~balls and they are large~~

BY MR. ANDERSON: ~~or, larger than the dots?~~

Q Now underneath the Munchkin, who is the smiling gentleman with horns, is a box and that box keeps stepping around in 90-degree steps as the game is proceeding?

A Right. ~~is not a larger box, that's correct.~~

Q There is nothing like that in Pac-Man, is there?

A The rotation of the box? ~~industry has been doing~~

Q The rotation of the box. ~~TV games or wraparound?~~

A True.

Q In fact, there is no square box in Pac-Man, is it an elongated box, isn't it?

A Just slightly. It is a slightly different formation.

Q It is big enough to receive three of what you call

ghosts?

A That is correct. I talked to people in the arcade.

Q And Pac-Man uses four ghosts?

A That is correct. I think it is a term fondly

Q Now Munchkin has only three Munchkins, is that correct?

MR. VITTUM: You have to answer audibly. Answer

audibly. You can't just nod.

BY THE WITNESS:

A Yes. Could you explain what you mean by that.

BY MR. ANDERSON:

Q You talked about power pills and they are large pills, much fatter, larger than the dots?

A Right. Only one mass, is that correct?

Q Now there is no such larger power dot in K. C. Munchkin, is that correct?

A There is not a larger dot, that's correct.

Q Now you talked about wrapover as a term well known in the trade, is that right? The industry has been using wrapover since they have been making TV games or wraparound?

A Wraparound.

Q Wraparound.

A Wraparound, right.

Q Wraparound is just a standard way of programming

games?

A When I talked to programmers, they called it a wraparound feature. When I talked to people in the arcades, they call it a wraparound feature and I am sure managerial-type people may know that term. I think it is a term fondly used by players and programmers.

Q And with respect to the different modes of play, Pac-Man has only one mode of play, is that correct?

MR. VITTUM: Objection, your Honor. I am not sure what is meant by "mode of play."

THE COURT: Could you explain what you mean by that, Mr. Anderson?

MR. ANDERSON: Yes, indeed. I am sorry.

BY MR. ANDERSON:

Q Pac-Man has only one maze, is that correct?

A That's correct.

Q And that one maze is always constant, it never moves or changes?

A That's correct.

Q There is no way you can have a variation in the maze?

A To my knowledge, that is correct.

Q Now you have named -- I am sorry. In Pac-Man, every one of your ghosts has a name, Shadow, Speedy, Bashful and Pokey, is that right?

A Well, they also have nicknames, but --

Q All right. But they have those names?

A Yes.

Q And do you know their nicknames by any chance?

A Inky, Blinky, Pinky and Clyde.

Q Now you are not suggesting that Magnavox or Odyssey has ever used any of those names that are displayed here in the console of the Pac-Man game?

A No, I am not.

Q Pac-Man has, at the bottom, a set of fruit symbols, cherries and oranges, is that correct?

A That is correct.

Q And those move up into the maze under certain conditions?

A That is correct.

Q And they are all special points?

A And those are bonus points or have some point value, that is correct.

Q Munchkin, K.C. Munchkin has nothing like that at all, is that correct?

A That's correct.

Q Now the display of the scoring, isn't it correct that Pac-Man is played out for two players and on the left it says, "One up" and on the right it says, "Two up"?

A Correct.

Q There is no such provision in K.C. Munchkin?

A But you and I can still play against each other on that game.

Q The answer to my question is no?

A It does not have a mode in the left-hand corner and in the right-hand corner, yes.

Q It doesn't have any provisions for two players playing together and alternating and running up scores and recording them in any way, is that correct?

A That's correct.

Q Now in K.C. Munchkin, there is a keyboard associated with the game, is that correct?

A Right.

Q There is no keyboard associated with Pac-Man at all, is that correct?

A That's correct.

Q And in K. C. Munchkin, the players can use the keyboard and record their own name if they score a high score, is that correct?

A That's correct.

Q And now, is it correct that in some of the modes of play in K. C. Munchkin, the maze actually disappears, becomes invisible so the player has the problem of trying to stay within the maze when he can't even see, is that correct?

A Right, for a brief period of time.

Q What determines how long, do you know?

A The computer.

Q Nothing else?

A To my knowledge, no.

Q Is it when the Munchkin hits a wall, do you know?

A I do not know, no.

Q You haven't played it that much?

A I haven't played that particular game.

Q What games have you played on Munchkin?

A Similar to the ones that are up there right now.

Q Just the first one? I might say I just punched "reset" and "Mode 6" on the keyboard on Munchkin though it is now playing one of the invisible modes and as I think you can see, your Honor, the maze does disappear, is that right, Mr. Moone?

A Yes.

Q So in Munchkin, there is a new dimension of the game where you are playing --

THE COURT: It all disappears except what is called the wraparound, just to test if I am understanding this. Is that the wraparound now on there?

THE WITNESS: Yes, it is.

MR. ANDERSON: Yes, your Honor, the hole on the right and the left.

THE COURT: Yes, all right. I am only testing my absorption of this. Go ahead.

BY MR. ANDERSON:

Q So that is a dimension of the game with invisible mazes that is available in K. C. Munchkin that just isn't even a part of Pac-Man, is that correct?

A But I would offer that the dots are still there, the power pills are still there.

Q Yes, and they are moving?

A That's correct --

Q There are only 12?

A -- as I testified earlier.

Q And there are only 12 of them, there are only 12 dots in Munchkin?

A Yes.

Q There are well in excess of 200 in Pac-Man, is that correct?

A As I testified earlier, there are certain engineering limitations within the home video game and whether they are or not the cause of some of these differences, I don't know.

Q You don't know that?

A Right.

Q Now Mr. Moone, is it correct also that if I press "reset" and then press "P" on the console of the K.C. Munchkin game it goes into a programmable mode?

A Where one can change the maze.

Q Where he can create his own maze?

A Right.

Q So in that case, by pressing any letter and number and enter, I build a new line, is that correct?

A Right.

Q Now that is unique to K.C. Munchkin, so far as Pac-Man is concerned, isn't it?

A Yes.

Q Pac-Man has nothing like that?

A Pac-Man does not have that feature.

MR. VITTUM: Mr. Anderson, are you done over here?

MR. ANDERSON: Yes, I think so.

MR. VITTUM: So he can go back and sit down.

BY MR. ANDERSON:

Q Now Mr. Moone, you filed, you signed an affidavit in this case?

A Yes, I did.

Q Do you by any chance have a copy of it?

A My copy of the affidavit is in the back of the room.

MR. VITTUM: We will provide him with a copy.

THE COURT: That was attached to the motion for --

MR. VITTUM: Yes, it was, your Honor.

THE COURT: -- for a temporary restraining order.

All right.

MR. VITTUM: We certainly don't object to having counsel cross examine the witness on his affidavit,

your Honor, however in view of the nature of the proceeding, in fact that the Court has indicated it does not intend to rely on the affidavit --

THE COURT: Well that is because Mr. Anderson said he understood the proceedings would not include -- that is, you weren't going to offer the affidavit in evidence, were you? Mr. Moone is right here.

MR. VITTUM: We have had his testimony.

MR. ANDERSON: No, I did not plan to offer the affidavit.

THE COURT: All right. You may question him if he has made a statement prior to his testimony, which he has, evidently. You may ask him about that.

BY MR. ANDERSON:

Q Now, Mr. Moone, with respect to Pac-Man, is it true that in Pac-Man when the yellow Pac-Man hits one of your large or colored dots, he becomes an aggressor, he goes after your ghosts, is that correct?

A That's correct.

Q And is it correct that in that mode, the ghosts slow down, when the Pac-Man engages a power dot, the ghosts slow down so the Pac-Man can catch them?

A As a game player, I have not observed them slowing down. I have observed the fact that one can become the pursuer rather than the pursued.

Q You don't know whether the ghosts slow down or not, then, in Pac-Man?

A I have never measured the speed.

Q You never observed it, is that correct?

A I am answering the question as a game player. I have not noticed that the ghosts slow down.

Q In K.C. Munchkin, when the munchkin engages one of the colored dots, do you know, do the munchers slow down or speed up?

A To my knowledge, they don't.

Q They just stay the same?

A That is correct.

Q No change in speed at all?

A No.

Q I would like to have you refer to your affidavit, Page 5, if you will, in Paragraph 8, up from the bottom of that paragraph, two, four, six lines, the line that starts out, "Well, as its overall," do you see that?

A I am sorry. What --

Q Are you on Page 5 of your affidavit?

A Page 5, right.

Q Paragraph 8.

A Paragraph 8.

Q Go down.

A "When observed from an ordinary viewing distance."

Q Right. Go down, one, two, three, four, five, six, seven, eight, nine, ten lines to "Well, as" the line starts. Do you see that?

A Yes.

Q "Well, as its overall size are substantially the same" -- I am interested in the next sentence, "The opponents in both games move slightly slower than the players' symbol after a flashing dot has been eaten."

A Yes.

Q Now if I understand what you said, you don't know whether that is true or not?

A I have never calibrated the speed. I have no means of doing it.

Q What was the basis on which you put that in your affidavit?

A Playing the games. In terms of inserting a quarter for playing your game.

Q All right then. What is your testimony? Do you say that in Pac-Man the components, the ghosts slow down or they don't slow down after a power dot is engaged?

A It appears to me that they may move slightly slower but I don't -- to me it is not an appreciable difference and I don't find them any easier to catch than I do getting away from them, frankly.

Q Why did you believe it was important to put that

in your affidavit then?

A Trying to be, without being an engineer, trying to be as technical as I could.

Q All right.

A When I am standing there playing the games and talking out loud to myself as I am playing the games.

Q With respect to K.C. Munchkin, when the munchkin engages one of the colored dots that are moving about the maze, do the munchers slow down or stay the same speed or speed up?

A I think that is a little more difficult to gauge because you don't have the same distance when one gauges speed relative to distance covered.

Q Do you have any idea which it is? Do they slow down, speed up or stay the same?

A What I believe as a game player is that they react the same. When I munch a dot, a power pill in Pac-Man, or whether I munch the power pill in your client's game, I believe that what happens, what takes place after that, is very similar.

Q Very similar. Now to try to quantize what you mean by very similar, can you tell me in K.C. Munchkin, do the munchers slow down, speed up or stay the same speed after the Munchkin engages a colored dot and if you don't know, that is all right.

A It appears to take place the same as it takes place

in Pac-Man.

Q What does that mean in answer to my question?

A They appear to operate in the same manner.

Q Do they slow down, speed up or stay the same speed?

A They stay approximately the same speed, relative one to the other, Pac-Man relative to Munchkin or vice versa.

Q When you say approximately, in your affidavit you say slightly slower. Is it your testimony that as far as you know, both of them move slightly slower after the event that you are talking about?

A Slightly slower.

Q Now in your affidavit at Page 6, the third line you state "Also, minor differences exist in some of the colors and sounds accompanying the game."

A Right.

Q What similarities are there between the sounds of Pac-Man and the sounds of K.C. Munchkin?

A Well, if you will, I think that is a bit of an unfair question.

Q All right, I will withdraw that one.

A Because --

Q No, that's all right. I don't want to --

A Getting back to the technology --

Q -- to ask unfair questions, Mr. Moone.

THE COURT: All right, let us proceed then. Put

another question to the witness.

BY MR. ANDERSON:

Q Tell me about the minor differences that you have referred to in your affidavit, between the sounds accompanying the K.C. Munchkin game and the Pac-Man game.

A In which reference, if you would, please?

Q It is at the top of Page 6 of your affidavit, the third line. You say, "Also, minor differences exist in some of the colors and sounds accompanying the game."

A Well, that is in terms of some of the colors.

Q My question is only about the sounds.

A Just some of the sounds? It is simply pitch, I mean, pitch to the ear itself. It is not the same tone.

Q Am I correct that in Pac-Man the game actually plays music?

A There is a tune, sort of a tune.

Q There are no tunes in Munchkin?

A They are sounds. I hear electronic sounds.

Q Are there tunes?

A There couldn't be tunes.

Q There couldn't be tunes?

A No, because of the chip set.

Q So there aren't tunes because there couldn't be

tunes?

A Well to me, it is not a tune, but to the consumer,

I don't know. It may very well be a tune. It makes a noise and it makes a noise with some kind of pitch and tone to it. I wouldn't call it a tune as I would with what I hear in Pac-Man but knowing what I do about the two, one couldn't expect that.

Q All right. With respect to the minor differences in some of the colors in Munchkin and in Pac-Man, am I correct that the Pac-Man character is yellow?

A That's correct.

Q And there is no corresponding yellow character in K.C. Munchkin, is there?

A As I testified earlier, the color of Pac-Man in your game is a yellow-green.

Q All right. He is supposed to be blue and I do believe that is the result of the way your TV set is tuned up but we will get to that.

Certainly in the advertisement which you have in front of you, Plaintiffs' Exhibit 6, the Munchkin is at the bottom of the page, isn't it?

A Right.

Q And he is pretty --

A Exhibit 6?

Q Yes. He is pretty blue, isn't he?

A He is blue, that's correct.

THE COURT: Mr. Anderson, I was hoping you would be finished with this witness but I think we are going

to have to take a recess in this case.

Mr. Grice, it will be all right to have the matters remain on the desk just like they are now?

THE CLERK: Very well. Fine, your Honor.

THE COURT: Could you rearrange this equipment so the jury can come in to return the verdict and then we will resume this hearing. We can go until 5:30 in this case so I will just tell you that. That is as much time as we have today. We are going to have to have to take a short recess and get everybody here, and tell them there are other papers there and don't touch the papers, just sit down. There will be one defendant and the lawyers.

MR. VITTUM: Do you want us to move the games?

THE COURT: Just move them to one side so that the jury can come by it. Remember, we don't have Workmen's Compensation protection in the courtroom.

(Thereupon the Court gave attention to another matter, after which the following further proceedings were had herein.)

THE COURT: All right. Mr. Grice, you may tell the lawyers to resume where we left off.

MR. VITTUM: Your Honor, may I observe that the direct examination of this witness took just about a

half an hour and cross is now consuming better than an hour.

THE COURT: All right. Proceed. Let us proceed.

MR. ANDERSON: I wonder if we could have some help.

That is all right. We have boys just to do this.

BY MR. ANDERSON:

Q All right. Mr. Moone, I have asked this gentleman to actually start the Pac-Man game into a playing mode and I would like you to listen to the audio, if you will.

MR. ANDERSON: Would you do that, Ed, just play it?

MR. VITTUM: The record should show your assistant is controlling the movement of the Pac-Man character through the use of a joy stick, is that correct? Is that correct, Mr. Mason?

MR. MASON: That is correct.

MR. ANDERSON: All right. That is probably enough.

Thank you, Ed.

BY MR. ANDERSON:

Q Unfortunately, I don't want to take the time. The music comes at different times, doesn't it, at the end of the game or --

A That is correct.

Q And I don't know that we have to go that far, but what you have now heard is ordinary play of the Pac-Man game,

is that correct?

A That is correct.

MR. ANDERSON: Now Ed, can we stop this? Now, could you start the K.C. Munchkin as it is being played on the console, Defendants' Exhibit 2, with the Odyssey Munchkin cartridge.

BY MR. ANDERSON:

Q All that is happening, Mr. Moone.

I will ask you to watch the dots. Is it correct, for example, that colored dot in the upper left-hand corner can move anywhere on the screen?

A The dot that we are seeing starts in the left-hand corner and the dot on the right-hand does not move, does lay out on the right-hand corner. The dot in the lower right-hand corner has not moved beyond the wraparound.

Q The lower right-hand corner is in the middle of the screen right now?

A Now at this point it has now moved, right.

Q And you played the game in K.C. Munchkin?

A Right.

Q And in K.C. Munchkin, those dots can move anywhere on the screen, is that correct?

A That's correct.

Q So your testimony about entrapment in the corner to be near what you call a power dot, in comparing that to

Munchkin, is just not present in Munchkin when those dots

are moved out of the corridor, isn't that right?

A -- the colored dots, are just in the corners. At the very beginning of the game they can go anywhere in the entire game, once the game starts, is that correct?

Q When the game begins?

A During your demonstration, only one of those power

A That's correct.

Q But the first instant, you say it is identical?

A That's correct.

Q Even though there are only 12 dots in the field

and all the other things we have talked about?

A But the object is to move to the power pills so you can switch from being the pursued to the pursuer.

Q That is what you call the concept of the game?

A No. That is what I would call the appearance or

the essence of the game, not necessarily the concept of the game.

Q The appearance of the game. Why do you say -- that is the appearance of the game?

A That's right.

Q I am looking at the display of the cartridge. What did you say is the appearance of the game?

A The appearance --

Q The appearance --

A -- relative to the power pills in the corners.

Q But the power pills in the corners, as you call

them --

A Yes, right.

Q -- the colored dots, are just in the corners. At

the very beginning of the game they can go anywhere in the entire maze, once the game starts, is that correct?

A During your demonstration, only one of those power pills moved from a corner.

Q Isn't that just because we didn't play it long enough? Now you --

A But that's the question of every game. But, your man was able to get the three power pills while they were still in the corner. There is only one that has moved out of the corner.

Q The power pills will move anywhere in the field, what you call the power pills will move anywhere in the field in Munchkin?

A That is right, after a period of time.

Q They start moving immediately, don't they?

A No. I mean, there is some movement on the screen but as one can see there, they are merely moving in a vertical or horizontal plane but they are still within the quadrant, if you will, of the corners.

Q They can only move either vertically or horizontally?

A That's correct.

Q That is just the nature of TV games.

A Right.

Q Is that right?

A That's correct.

Q They never stand still, none of the dots in K.C. Munchkin ever stand still, is that correct?

A That's correct, but the expression is the same. That is where the similarity is.

Q The expression, what expression are you talking about?

A The expression, the appearance.

Q What expression, what appearance specifically are you referring to?

A I am referring back to the Pac-Man moving through a maze.

Q No, no. I want to know about the expression that you just mentioned in the K.C. Munchkin.

A The expression of the dots being in the corners as the game begins. If you were lucky enough to consume all the dots, the game racks and begins again and once again those dots are in the corners, the expression of the game is identical once again.

Q At the very instant when the game starts?

A Every time you rack, it takes right over and then the other point, when you play those two games, which I would like to bring out, as I heard this di di di di in your game

and this game here, very similar if not the same tone, very similar to what I heard in Pac-Man.

Q That is my next question. Exactly what -- you said you didn't know of any similarity. You said it was a tough question before. I wanted you to hear them. Now exactly what are you saying is copied by Munchkin in the way of audio from Pac-Man, if anything?

A When --

Q Can you answer that?

A When Pac-Man munches --

MR. VITTUM: Will you let the witness answer?

BY THE WITNESS:

A When Pac-Man munches, he goes di di di di di. I am sorry I can't do it better. That is as good as I can do it but when Pac-Man munches or when your Pac-Man munches, he runs down that trail and he goes di di di di the same. The tone is different but as I testified --

THE COURT: Let me call your attention to the fact that we are hearing a motion for preliminary injunction and some of these questions I can answer for myself by looking at these two games.

You know, with due respect to Mr. Moone, Mr. Moone's appraisal of the similarity of these two games is not what is going to count in this case. I am going to look at these two games and I can tell the

extent to which they are similar and I can tell by looking at them whether there has been a copying in violation of a copyright. I can tell by looking at it.

Q So I don't think we should devote all our time just being sure what Mr. Moone thinks about it.

A MR. ANDERSON: All right. Thank you, your Honor.

THE COURT: Let us proceed now. program, is that

MR. ANDERSON: Very fine.

BY MR. ANDERSON:

Q Mr. Moone, I would like to refer to Paragraph 13 of your affidavit, the second sentence where you said on the 18th of November, "If North American is permitted to continue marketing its K. C. Munchkin home video game, the market for Atari's Pac-Man's home video game will be drastically reduced and the prospect for successfully introducing the Pac-Man game to the home video game market will be significantly diminished."

A That is correct.

Q Now as a matter of fact, you have already sold a million Pac-Man units for Atari consoles, is that right?

A Approximately, yes, that is correct.

Q And you have had not a single cancelled order?

A That is correct.

Q And you haven't cancelled any orders for new materials?

1 A Nor have we released orders for new materials.

2 Q You haven't cancelled any orders?

3 A That is correct.

4 Q You haven't changed your manufacturing program,  
5 fired any people?

6 A Fired any people?

7 Q Or eliminated any people for the program, is that  
8 correct?

9 A That I would directly attribute to this? No.

10 Q You are going full blast, is that correct?

11 A That is not correct.

12 Q Have you ever said any of the things I asked you  
13 about, is that correct?

14 A I think that your client can appreciate the fact  
15 that in the consumer business no one commits for an entire  
16 year up front and during the course of the year, relative  
17 to the sales and the performance of any product, any consumer  
18 manufacturing company will go back to vendors and increase  
19 orders or cancel orders if they are able to.

20 The fact of the matter is I have not given authori-  
21 zation to our manufacturing people to proceed in an aggressive  
22 manner beyond the first quarter and much of that --

23 Q Of 1982? That is, the first quarter of 1982?

24 A The first quarter of 1982. And as I testified  
25 earlier, because I have been questioned by senior management,

the major retailers, who feel at this point our program could be in jeopardy.

MR. ANDERSON: I have no further questions, your Honor.

THE COURT: Any redirect?

MR. VITTUM: Just one or two very brief questions, your Honor.

THE COURT: REDIRECT EXAMINATION

BY MR. VITTUM:

Q You testified in your cross examination, Mr. Moone, that the K. C. Munchkin features the concept of the Pac-Man game. Does the K. C. Munchkin game also embody the audio-visual expression of the Pac-Man game?

A Yes.

MR. ANDERSON: I object, your Honor.

MR. VITTUM: Excuse me.

MR. ANDERSON: I object, your Honor. That is a word of art. Expression is in the cases and I object to this witness --

THE COURT: Let me leave it this way: I have heard both. That is Mr. Moone's construction of it, his

interpretation of it. I have heard both. I will enter-

tain your proposed findings, I will look at them, they

will be right here. I will listen to them again.

Let's proceed now.

BY MR. VITTUM:

Q I show you Plaintiffs' Exhibit 17 for identification, United Mainliner Magazine, November, 1981, an advertisement appearing at Page 55 and ask if you have seen that magazine and seen that advertisement, Mr. Moone.

MR. ANDERSON: Excuse me.

MR. VITTUM: Let me show counsel.

THE COURT: Plaintiffs' Exhibit 17?

MR. VITTUM: 17 for identification, your Honor.

BY MR. VITTUM:

Q In your direct examination, I believe you referred to -- your cross examination, rather, you referred to Odyssey advertising featuring a number of sports figures for different cartridges.

A Yes, that is correct.

Q Is that what Plaintiffs' Exhibit 17 for identification is?

A Yes, it is.

Q Now directing your attention to Plaintiffs' Exhibit 6, which I believe you still have before you, which is the Odyssey advertisement featuring graphically the K.C. Munchkin cartridge, would you explain, Mr. Moone, how an advertisement such as that featuring a single cartridge in association with the Odyssey game console, can affect Atari's business?

A Yes, in the words of the senior buyer of Sears

1 Roebuck and Company, Mr. Dick Lairberg who --

2 MR. ANDERSON: I object, your Honor. I don't think  
3 that we are interested in --

4 THE COURT: The objection will be sustained.

5 BY THE WITNESS:

6 A Who held up --

7 THE COURT: The objection is sustained. Don't  
8 repeat something that someone else has said, Mr. Moone.

9 Put the question again to him.

10 BY MR. VITTUM:

11 Q Mr. Moone, what I am interested in is how the sale  
12 of the Odyssey console which is Defendants' Exhibit 2 is  
13 affected by advertising for a cartridge such as the Munchkin  
14 cartridge shown in Plaintiffs' Exhibit 6?

15 A The consumer demand for Pac-Man, for the authentic  
16 Pac-Man, is sufficient to preempt the software or hardware  
17 sale of a competitive system. The consumer demand is strong  
18 enough in this country today that Pac-Man will cause the  
19 consumer to purchase the cartridge in the system, the total  
20 system, that is, the hardware unit as well as the cartridge  
21 itself.

22 Q Can a consumer who buys the Odyssey console,  
23 Defendants' Exhibit 2, then buy the genuine Atari licensed  
24 Pac-Man cartridge and play the game through that console?

25 A No, they cannot.

1 Q Directing your attention again to the game, K. C.  
2 Munchkin, as played through the console, Defendants' Exhibit  
3 2, I am going to push the reset button and then the zero maze  
4 and I ask you if that is not the maze that, in fact, was  
5 shown on the video tape, Plaintiffs' Exhibit 8, which was  
6 exhibited and also the maze shown in the advertisement which  
7 is Plaintiffs' Exhibit 6?

8 A Yes, it is. It's the same maze.

9 Q Can one play the K. C. Munchkin game solely on the  
10 basis of this maze that is shown now, based on the pushing  
11 the zero button? Can one play through a complete K. C. Munchkin  
12 game without using any of the other mazes that are shown?

13 A Yes. I received a call this morning from Sayco Corporation

14 MR. VITTUM: No further questions, Judge. They had

15 THE COURT: All right. Any recross?

16 MR. ANDERSON: Just one point, your Honor.

17 RECROSS EXAMINATION

18 BY MR. ANDERSON:

19 Q You just testified with respect to someone buying  
20 a console just -- I think you said an Odyssey console, just  
21 because he wanted a K. C. Munchkin cartridge and bought the  
22 console, too, where he would have otherwise bought an Atari  
23 console -- is that the point you were trying to make?

24 A The point that I made is that the consumer, there  
25 is the general merchandise consumer.

1 is enough pent-up demand for a Pac-Man cartridge and the  
2 confusion that exists today over this being a copy of Pac-Man,  
3 could induce the consumer to purchase the Magnavox cartridge  
4 and console rather than purchasing the Atari product and  
5 the Atari exclusively licensed Pac-Man cartridge.

6 Q Can you identify specifically a single instance  
7 where that has happened?

8 A Can I identify a single instance?

9 Q A specific instance.

10 A Probably, yes.

11 Q All right. I want the name so we can follow up on  
12 it. What is that instance?

13 A I received a call this morning from Zayre Corporation  
14 where five of their stores called the home office. They had  
15 been informed that the Pac-Man cartridge was available at  
16 retail. Consumers came in and asked --

17 Q May I ask who?

18 A Consumers.

19 Q You don't know who the call was from?

20 A I would have to trace this down through the Zayre  
21 Corporation.

22 Q Did you talk to them? Who did you talk with?

23 A I talked with Mr. Al Fine.

24 Q Al Fine of Zayre?

25 A Who is the general merchandise manager.

1 Q And -- go ahead.

2 A And consumers that come in their stores asking for  
3 a Pac-Man cartridge, specifically asking for the Pac-Man  
4 cartridge. The stores have gone to their merchandise buying  
5 guides and the cartridge, according to the literature given  
6 to them by the buying office states this will not be available  
7 until February.

8 Since that information was available retail, the  
9 clerks or store managers took upon themselves to call the  
10 buyer, the parent company, and asked what this is all about.

11 Q That's it?

12 A That's correct.

13 MR. ANDERSON: No further questions, your Honor.

14 (Witness excused.)

15 MR. VITTUM: Plaintiffs' offer Exhibit 17, the  
16 advertisement from United Mainliner Magazine.

17 THE COURT: Any objection?

18 MR. ANDERSON: No objection, your Honor.

19 THE COURT: It is admitted in evidence.

20 (Said exhibit, so offered, was received  
21 in evidence as Plaintiffs' Exhibit 17.)

22 THE COURT: All right. The next witness?

23 MR. VITTUM: The Plaintiffs call Thomas Gallo.

24 THE COURT: All right, Mr. Moone, thank you.

1  
2 THOMAS P. GALLO,  
3 called as a witness by the plaintiffs, having been first duly  
4 sworn, was examined and testified as follows:

5 THE CLERK: Please be seated, state your full name,  
6 spell your last name, lean forward and speak to that  
7 microphone and keep your voice up.

8 THE WITNESS: Thomas P. Gallo, G-a-l-l-o.

9 DIRECT EXAMINATION

10 BY MR. VITTUM:

11 Q Mr. Gallo, by whom are you employed?

12 A I am employed by Kirkland & Ellis as an investigator.

13 Q To move things along, I will put the originals of  
14 Plaintiffs' Exhibit 9 through 12 for identification to the  
15 witness.

16 Mr. Gallo, did I ask you to undertake an investiga-  
17 tion concerning the K. C. Munchkin video game?

18 A Yes, you did.

19 Q Tell me what you did as a result of that request?

20 A I have seen advertisements in the -- this one,  
21 Plaintiffs' Exhibit 9 on November 13, 1981 for the K. C.  
22 Munchkin game which is a Pac-Man-type game, that was  
23 apparently placed there by Minnesota Fats.

24 Q Did you visit any retail stores as a part of the  
25 investigation after seeing the Plaintiffs' Exhibit 9 advertise-  
ment?

1 A Yes, I did. On November 15th, I visited Minnesota  
2 Fats at 5207 West 95th Street in Oak Lawn and purchased a  
3 K. C. Munchkin game.

4 Q Can you describe what was said to you by the  
5 retail store clerk at the time of your visit to Minnesota  
6 Fats?

7 A Yes. I walked into the store in the video section  
8 in the back part of the store and I asked the clerk if they  
9 had the K. C. Munchkin game. She replied that they did.  
10 While she was -- and then she turned around and got the cart-  
11 ridge from behind the counter. I examined the cartridge  
12 briefly and asked her what it did and she said, "Have you  
13 ever played Pac-Man?" I said, "Yes." She said, to me, "It  
14 is just like Pac-Man."

15 I subsequently purchased the game.

16 Q Did you contact any other retailers prior to the  
17 time suit was filed in this case on November 18th?

18 A Yes, I did. I contacted the Legion Home Magnavox --  
19 Legion Magnavox Home Entertainment Center in Matteson, Illinois  
20 and spoke with a male salesclerk there. I asked him if they  
21 had any K. C. Munchkin game in stock and he said no, they  
22 did not, that they were sold out, that each dealer only got  
23 six to ten test units and he was expecting in a shipment of  
24 K. C. Munchkin games, I think he said a thousand games. I  
25 know he said a thousand games -- and that those would be

1 arriving from his distributor on December 1st.

2 Q In any of your visits to retail establishments,  
3 Mr. Gallo, did you see any point of purchase sale materials  
4 in connection with the K. C. Munchkin product?

5 A Yes, I did. The first store that I visited, the  
6 Minnesota Fats store in Oak Lawn, had at the end of their  
7 counter, a posterboard-type display, maybe 15 inches by 9  
8 inches that featured the picture of the K. C. Munchkin, which  
9 would be the face of the cartridge, which said something to  
10 the effect, "You don't destroy your enemies; you simply eat  
11 them."

12 In addition to that posterboard, there was, at the  
13 end of the store -- I forget which direction that is right  
14 now -- taped to some boxes the advertisement that appeared in  
15 I believe it was Newsweek Magazine.

16 There was a blown-up version of the advertisement.  
17 It looked much the same as the posterboard ad that was there,  
18 only on the bottom of that, it said, "Will appear in Time and  
19 Newsweek November 16 and November 30, 1981."

20 Q And the ad which you saw blown up in the store was  
21 the same version as Plaintiffs' Exhibit 6, is that correct?

22 A Yes.

23 Q After the suit was filed, had you conducted any  
24 further investigations of the retail trade in Chicago in  
25 connection with the K. C. Munchkin game?

1 A Yes, I did. I contacted the store called Video  
2 Track in South Holland, Illinois and I went there, it was on  
3 November 23rd, this last Monday and I stopped in and was greeted  
4 by a male salesclerk. And I said, "Yes, I have."

5 He said, "May I help you?"  
6 And I said, "Yes. Do you carry Odyssey games?"

7 And he said yes, they did. And he directed me toward-

8 MR. ANDERSON: Your Honor, I must object. I think  
9 this is being offered for the truth of what the clerk  
10 said and I think it is hearsay and inappropriate.

11 MR. VITTUM: Your Honor, I would submit that in a  
12 case such as this where we are endeavoring to prove  
13 confusion at the retail trade, the state of mind excep-  
14 tion permits it.

15 THE COURT: It is not being offered for that purpose.  
16 I understand it is being offered to show what this  
17 witness did and what he learned. No, that is not  
18 hearsay. Let us proceed. The objection of overruled.

19 MR. ANDERSON: Thank you, your Honor.

20 MR. VITTUM: Thank you.  
21 BY THE WITNESS:

22 A He pointed to a large vertical glass display case  
23 on the west wall of the store. There were a number of  
24 Odyssey games in there. I looked at the Odyssey games  
25 briefly and said to him, "Do you have anything new?"

1 He said, "Yes, K. C. Munchkin. We just got it in."

2 And I said, "Can I see it?" And he said, "Yes."

3 And I said to him, "What does it do?" He said, "Have you  
4 ever played Pac-Man in the arcades?" And I said, "Yes, I have."

5 Then he began demonstrating the game. There was  
6 already an Odyssey unit set up for demonstration purposes  
7 along with the television. It had already had a K. C. Munchkin  
8 cartridge in it and he demonstrated the game for me.

9 I then told him that I liked the game and I wanted  
10 to purchase it. ~~Would be Plaintiff's Exhibit 10, which is another~~

11 Q Where there any other conversations with anyone  
12 present in the store at that time? ~~which it says~~

13 A Yes. While I was purchasing the game, a smaller man,  
14 about my size, came out of the office of the store that was  
15 located about two-thirds of the way into the back of the store,  
16 and the salesman asked him, "Is this the only cartridge we have  
17 left? Is this the only K. C. Munchkin game we have left?"  
18 referring to the cartridge that was already in the Odyssey game  
19 and the smaller gentleman said, "No," and went into the display  
20 case and took out the last K. C. Munchkin game.

21 I said something to the effect like, "Gee, that is  
22 a neat game," to the smaller man who appeared to be the owner.  
23 And he said, "Yes, it is incredible. The sales, we didn't  
24 anticipate the kind of sales of the Pac-Man game. As you can  
25 see, it is our last one, but we are getting a big shipment on

1 December 1st."

2 Q You already referred to Plaintiffs' Exhibit 9 for  
3 identification that refers to the K. C. Munchkin as a  
4 Pac-Man-type game. Are you aware of any other retail adver-  
5 tisements for K. C. Munchkin that have appeared in Chicago  
6 newspapers since the lawsuit was filed?

7 A Yes, there were two additional advertisements that  
8 appeared in the papers last week.

9 Q Would you describe what those are?

10 A That would be Plaintiffs' Exhibit 10, which is another  
11 advertisement placed by Minnesota Fats in the Chicago Tribune  
12 on November 20th for the K. C. Munchkin game which it says  
13 is challenging as Pac-Man.

14 Q What about Plaintiffs' Exhibit 11, Mr. Gallo?

15 A Plaintiffs' Exhibit 11 is an advertisement that  
16 appeared in the Chicago Tribune on Sunday, November 22nd  
17 which again says, "A Pac-Man-type game." It's an ad by  
18 Minnesota Fats. This is, I believe, the same ad as Plaintiffs'  
19 Exhibit No. 9.

20 Q But it ran in a different newspaper, is that right?

21 A Yes, Plaintiffs' Exhibit 9 ran in the Chicago  
22 Sun-Times.

23 Q Finally, can you identify Plaintiffs' Exhibit 12  
24 for identification? That has previously been referred to  
25 in Mr. Moone's cross examination but if you can briefly

1 identify it -- I said to her, "Have you seen this game?"

2 And A Yes. This is the other ad that I saw in the  
3 Sun-Times on November 22nd, which is Sunday, featuring the  
4 K. C. Munchkin video game and display board there.

5 Q At any time, did you visit American Sales in C.  
6 Bridgeview, Mr. Gallo?

7 A Yes, I did. I went to American Sales on November 18th  
8 of this year and again, I asked for a K. C. Munchkin game  
9 and as the clerk handed it to me, I basically said the same  
10 thing again that I said to the other retailers. I said,  
11 "What does it do?"

12 And he said, "It is just like Pac-Man," and he  
13 proceeded to demonstrate the game for me.

14 Q Have you visited any other Minnesota Fats retail  
15 establishments, Minnesota Fats being the advertiser in  
16 Plaintiffs' Exhibits 9 and 11.

17 A Yes. Last Monday, November 23rd, I visited the  
18 Minnesota Fats store at 6501 North Lincoln in Lincolnwood  
19 and I purchased a K. C. Munchkin game there as well.

20 Q What did the retail clerk say to you at that time,  
21 Mr. Gallo?

22 A On this occasion, I didn't -- the game, the K. C.  
23 Munchkin game was in the glass display case and I asked the  
24 female salesclerk if I could see the game.

25 She then took it out of the display case and

1 handed it to me. I said to her, "Have you seen this game?"  
2 And she said, "I haven't seen it but I just purchased one  
3 for my daughter for Christmas. It's Odyssey's Pac-Man."

4 Q Mr. Gallo, did you visit any Odyssey retail estab-  
5 lishment in the Chicago area in connection with the K. C.  
6 Munchkin investigation where the Pac-Man game was not at  
7 some point mentioned?

8 A Just one. That was the American Sales store located  
9 in Calumet City.

10 Q Every other one, Pac-Man was mentioned in associa-  
11 tion with K. C. Munchkin, is that right?

12 A Yes, sir, it was.

13 MR. VITTUM: No further questions, your Honor. We  
14 would offer, plaintiffs would offer Exhibits 9 through  
15 12 for identification.

16 MR. ANDERSON: Your Honor, we have no objection  
17 to Exhibits 10 and 12. We do object to Exhibits 9 and  
18 11 in that they are fragments, they are not the complete  
19 ad and we do have a complete ad here, I might say.

20 THE COURT: Why don't you just simply, under the  
21 rule of completeness, supplement the two exhibits, make  
22 it complete and admit it.

23 MR. VITTUM: We have no objection to that, your  
24 Honor.

25 THE COURT: I will admit it subject to your

1 supplementing the record with the incomplete portion.

2 (Said exhibits, so offered, were  
3 received in evidence as Plaintiffs'  
4 Exhibits 9 through 12.)

5 THE COURT: All right. Cross examination.

6 MR. ANDERSON: We will put the complete ads in,  
7 your Honor, as Defendants' Exhibits 4 and 5.

8 THE COURT: All right, Defendants' Exhibits 4  
9 and 5.

10 MR. ANDERSON: Yes, your Honor.

11 THE COURT: They may be admitted now under Rule 106  
12 of the rules of evidence.

13 MR. ANDERSON: Thank you, your Honor.

14 THE COURT: Defendants' Exhibits 5 and 6, is that  
15 right?

16 MR. ANDERSON: 4 and 5, your Honor.

17 THE COURT: 4 and 5. They are admitted in evidence  
18 at this time under Rule 106 of the rules of evidence.

19 (Said exhibits, so offered, were received  
20 in evidence as Defendants' Exhibit 4 and 5.)

21 THE COURT: All right.

22 CROSS EXAMINATION

23 BY MR. ANDERSON:

24 Q Mr. Gallo, did you provide these advertisements to  
25 Mr. Vittum or someone associated with him or was it vice versa?

1 A And I saw these ads in the paper. I believe Mr. Vittum  
2 had already -- was already aware of them. I brought copies  
3 in. Q And then in the lower --

4 Q Did you bring them in cut up like this, in this form,  
5 or did you bring them in some other form? corner is a refer--

6 A I think I brought in the entire ad.

7 Q Did you discuss with anyone whether to use the  
8 entire ad or just some small portion of it? well, a television

9 A No, I did not. well, you will stipulate that

10 Q That was not discussed. well, I have what this

11 I would like to hand you Page 40 from the November  
12 13, 1981 issue of Chicago Sun-Times and ask you if that  
13 shows the entire Minnesota Fats' ad that you saw? why is it

14 THE COURT: Which exhibit is this? I am looking at

15 MR. ANDERSON: This is Defendants' Exhibit 5, your

16 Honor. No, I am sorry, that is Defendants' Exhibit 4,

17 the one I have handed you. yes, your Honor.

18 THE COURT: All right.

19 BY THE WITNESS: well, when you went into one of the stores,

20 A Yes, I believe this is the same ad. yes, I

21 BY MR. ANDERSON: I brought to the American House of something

22 Q And the major portion of the ad related to an  
23 Atari game, is that right? well, you are referring to

24 A Yes. It is the larger portion of the ad. something

25 Q And included in the major portion of that portion

1 is an advertisement for a console?

2 A Yes.

3 Q And then in the lower --

4 A About half of that is console, yes.

5 Q And then in the lower left-hand corner is a refer-  
6 ence to cartridges?

7 A That is correct.

8 Q And then below that is an ad for Matel, a television?

9 MR. VITTUM: Your Honor, we will stipulate that  
10 the ad says what it says. I don't know what this  
11 witness' testimony about what it does or doesn't say  
12 has any bearing.

13 THE COURT: It is admitted in evidence. Why is it  
14 necessary to ask him any more about it? I am looking at  
15 it. I can look at it.

16 All right. Let us proceed now.

17 MR. ANDERSON: Thank you, your Honor.

18 BY MR. ANDERSON:

19 Q Now you said when you went into one of the stores,  
20 the salesperson had a K. C. Munchkin game right there. I  
21 think it was with respect to the American Store or something  
22 like that. He took it out of the case, is that right?

23 A I don't know which store you are referring to.  
24 Video Track had a demonstration cartridge of K. C. Munchkin  
25 already in an Odyssey game.

1 Q In an Odyssey game? these has testified it is identical

2 A Yes, sir.

3 Q Well you said with respect to one of them they had  
4 the K. C. Munchkin game in a sales case and then took it  
5 out. Now were you referring to the cartridge, or the console  
6 or the combination of both? as it also verbal?

7 A I meant they had a glass display case, as most  
8 stores do and they had the video games there. M. Villan?

9 I am referring to -- when I said they had the game,  
0 they had the box. I saw, initially, the box that the cartridge  
1 was contained in.

2 Q So when you used the term, "game," you were refer-  
3 ring to the cartridge in a box. That was the K. C. Munchkin  
4 game you referred to? as it was about or what it was. Is that

5 A Yes, sir.

6 Q But not in a console at that time? as it was in Oak Lawn

7 A It was in the console only on that one occasion.

8 Q I see. that one.

9 A That was the Video Track.

0 Q I would like to show you Defendants' Exhibit 5  
and ask you if that copy of the Chicago Tribune for Sunday,  
November 22, Section 16, Page 8, shows the second ad of  
Minnesota Fats about which you have testified.

MR. ANDERSON: Your Honor, we don't have copies  
of that one, but I think -- is it identical to the first

1 one? Yes, it is. The witness has testified it is identi-  
2 cal.

3 THE WITNESS: I believe this is the ad, yes.

4 BY MR. ANDERSON:

5 Q Now did you find that and call it to the attention  
6 of Mr. Vittum's office or was it vice versa?

7 A Well, I brought in all these ads, yes.

8 Q Did you take the complete ad in to Mr. Vittum?

9 A I sent it to him.

10 Q You sent it to him?

11 A Yes.

12 Q Now with respect to your call on the female salesclerk  
13 at Minnesota Fats, I think you said you asked about K. C.  
14 Munchkin and asked what it was about or what it was, is that  
15 right?

16 A Are you referring to the Minnesota Fats in Oak Lawn  
17 or the Minnesota Fats in Lincolnwood?

18 Q The first one.

19 A That would be in Oak lawn.

20 Q You just -- I am not sure. The first one you  
21 referred to, you related what the girl said.

22 A Yes.

23 Q You established you wanted the K. C. Munchkin,  
24 you asked how it played and I think you testified she  
25 answered, "Have you every played Pac-Man"?

1 A Yes, she did.

2 Q She said that?

3 A Yes.

4 Q And then you said, "Yes." And then, I think you  
5 testified she said, "It is just like Pac-Man"?

6 A "It is just like Pac-Man," she said.

7 Q Now is it correct then that she called a male  
8 salesclerk into the picture, as you stated in your affidavit?

9 A Yes, she did.

10 Q And you discussed the game with him also?

11 A He demonstrated the game.

12 Q He demonstrated it?

13 A He demonstrated it for me. She apparently didn't  
14 know how to set it up and get it working properly.

15 Q Is it correct that you said to him, "Do you have  
16 Pac-Man?"

17 A That is correct.

18 Q And he responded, the male salesperson at Minnesota  
19 Fats responded, "By Atari?" No. It won't be out until  
20 March."

1 That is what he said?

2 A That's correct. He is the only one that said it,  
3 yes.

4 MR. ANDERSON: No further questions, your Honor.

5 THE COURT: Any redirect examination?

1 MR. VITTUM: No, sir.

2 THE COURT: All right. Your next witness.

3 (Witness excused.)

4 MR. VITTUM: The plaintiffs call Charles Paul.

5 THE COURT: Stand and be sworn.

6 CHARLES S. PAUL,

7 called as a witness by the plaintiffs, having been first  
8 duly sworn, was examined and testified as follows:

9 THE COURT: Please be seated, state your full  
10 name for the record and spell your last name.

11 THE WITNESS: My name is Charles S. Paul. The  
12 last name is spelled P-a-u-l.

13 DIRECT EXAMINATION  
14 BY MR. VITTUM:

15 Q By whom are you employed, Mr. Paul?

16 A Atari, Incorporated.

17 Q In what capacity.

18 A I am Senior Vice-President and General Counsel of  
19 the corporation.

20 Q Mr. Paul, what are the annual revenues of Atari,  
21 Incorporated?

22 A In 1981, the annual revenues will safely exceed  
23 800 million dollars.

24 Q Would you describe your responsibilities in relation  
25 to Atari's program of obtaining licenses under copyrights to

1 popular coin-operated video games?

2 A I am in charge generally of all Atari's legal  
3 affairs and have been designated as the individual who should  
4 be primarily responsible for negotiating the licensing  
5 agreements with other video game manufacturers and obtaining  
6 licenses to games in which we are interested.

7 Q What was your personal role in the licensing of  
8 the Pac-Man video game?

9 A I negotiated the license for Pac-Man. I drafted  
10 the license agreement and I signed it on behalf of Atari.

11 Q What are some of the other video games for which  
12 Atari has obtained licenses under copyright?

13 A Atari has licensed the copyrights of Space Invaders,  
14 Defender, to name a few.

15 Q Are you familiar with a video game named Head-On?

16 A Yes, I am.

17 Q What is that video game?

18 A It is a video game that was produced by Sega-Gremlin  
19 Corporation involving two automobiles racing in opposite  
20 directions around a maze and trying to -- the object of the  
21 game is to avoid crashing the two automobiles.

22 Q Does Atari have any rights with respect to that  
23 game, any copyright rights?

24 A Yes, we do. We have an exclusive license to the  
25

1 copyright.

2 THE COURT: You may proceed.

3 MR. VITTUM: Thank you, Judge.

4 BY MR. VITTUM:

5 Q Does Atari have a position concerning video game  
6 copyrights, Mr. Paul?

7 A Yes, we do. Atari is committed to the copyright  
8 protection of video games and the enforcement of those  
9 copyrights.

10 Q If the Pac-Man copyright is not enforced against  
11 the K. C. Munchkin game, will that have an effect on Atari's  
12 attitude toward video game copyrights?

13 A It will  
14 It affect not only Atari's license agreements and  
15 its product protectability of the copyrights involved, but  
16 it will also affect the video game industry. If these copy-  
17 rights are not enforced against copies that are as close as  
18 K. C. Munchkin, it is my belief that the originators and  
19 creators of games that have been copyrighted will be punished  
20 and only the copiers will be rewarded.

21 Q Does the availability and the enforcement of copyright  
22 protection affect Atari's decision to pay substantial royalties  
23 to others for original copyrighted works?

24 A The obtaining of exclusive rights to a game is  
25 critical to our marketing and to maintain an exclusive position  
26 in the market, the enforcement of that copyright is critical.

Q Has the copyright here at issue been litigated elsewhere than this Court?

A Yes, it has. Atari filed an action Monday of this week in the Federal Court in California, Eastern District, and obtained that same Monday afternoon, a temporary restraining order from Judge Crocker of that Federal Court enjoining a company by the name of On Line Systems from selling a game called Gobbler and a game called Jawbreaker which infringed the copyright we have on Pac-Man.

MR. VITTUM: Your Honor, we have one other, very short piece of video tape which has been identified as Plaintiffs' Exhibit 13.

BY MR. VITTUM:

Q Mr. Paul, are you able to identify Plaintiffs' Exhibit 13 for identification?

A Yes, I am. This is the video tape which shows the Jawbreaker game being played on an Atari 800 personal computer.

MR. ANDERSON: Your Honor, I object to the exhibit and any testimony about it, not knowing where this is going. Jawbreaker just is not an issue here, it hasn't been raised.

THE COURT: What is the relevancy of that particular game to this one?

MR. VITTUM: Your Honor, in another proceeding

1 involving the very same Pac-Man copyright, earlier this  
2 week Atari sued a defendant and obtained a temporary  
3 restraining order.

4 THE COURT: That doesn't adjudicate the validity  
5 of the copyright, Mr. Vittum, unless you tell me something  
6 more. That doesn't --

7 MR. VITTUM: Your Honor -- excuse me.

8 THE COURT: What has that to do --

9 MR. VITTUM: This is not with respect to validity  
10 because validity has not been challenged. It goes  
11 very directly to the question of the scope of the copy-  
12 right.

13 THE COURT: No. I am going to sustain the objection  
14 because that has nothing to do with this case. Look, I  
15 am going to look at these two games when you are finished  
16 and I will decide whether or not there is any infringement  
17 shown in this motion for preliminary injunction. We don't  
18 have to go into other litigation about it. The objection  
19 is sustained.

20 MR. VITTUM: Your Honor, may I just say one thing --

21 THE COURT: Go ahead now. I think the question in  
22 this motion for preliminary injunction is limited to a  
23 showing whether or not there is an infringement and whether  
24 there is a violation of this copyright and whether or not  
25 the plaintiff is entitled to a preliminary injunction.

1 MR. VITTUM: Your Honor, I could not agree with  
2 you more. I am only submitting that as another  
3 proceeding involving the same copyright on the same  
4 game. The scope that was accorded the copyright by  
5 the Federal Judge who entered the temporary restraining  
6 order on Monday of this week is relevant to the scope  
7 to be accorded to the very same copyright here at issue.

8 THE COURT: He issued a temporary restraining order?

9 MR. VITTUM: Yes, he did, your Honor.

10 THE COURT: Well how do we know he is not going to  
11 dissolve it? No, let us not go into that. I don't think  
12 it is proper at all. That temporary restraining order  
13 may be dissolved. It would be different if you told me  
14 that this copyright has been fully litigated in similar  
15 circumstances and found valid and enforced. That would  
16 be different.

17 MR. VITTUM: Your Honor. May I --

18 THE COURT: That has nothing to do with it, no.

19 MR. VITTUM: Your Honor, that has happened in  
20 the Drickschneider case which we have attached to our  
21 memorandum. The copyright has been adjudicated.

22 THE COURT: Well then you call that to my attention.  
23 That is a matter of public record. We don't have to ask  
24 a lay witness about these matters.

25 MR. VITTUM: I have no further questions of this

1 witness.

2 THE COURT: Any cross examination?

3 MR. ANDERSON: Just a bit, your Honor.

4 CROSS EXAMINATION

5 BY MR. ANDERSON:

6 Q Mr. Paul, you mentioned Head-On, the game Head-On?

7 A Yes, I did.

8 Q That is a game involving a maze of tracks going  
9 around a video screen, is it not?

10 A It is a game involving automobiles going around a  
11 track.

12 Q The automobiles change tracks from under the control  
13 of the player, from track to track, is that correct?

14 A If the player wants to change the automobile, he can  
15 change it from one track to another.

16 Q There are dots in all the tracks, is that right?

17 A Yes, sir.

18 Q The idea is to eat up all the dots as you go around,  
19 is that right?

20 A The idea is to avoid crashing into the other  
21 automobile. They go in opposite directions.

22 Q Don't you eat up the dots as you go?

23 A That's correct.

24 Q You get points as you go around and eat up the  
25 dots, is that right?

A You get points for a number of different things that you can accomplish during the play of the game.

Q You can manipulate a joy stick to move the vehicle from track to track to avoid the enemy car that is coming at you, is that correct?

A I believe I testified to such.

Q All right. I have had marked as Defendants' Exhibit 13, Defendants' Exhibit 6 through 13, some colored pictures and I would like you --

MR. VITTUM: May I see those, Counsel, for just a moment?

MR. ANDERSON: You have a set.

MR. VITTUM: I haven't seen the pictures.

MR. ANDERSON: You have seen copies, haven't you?

MR. VITTUM: Yes.

BY MR. ANDERSON:

Q And I would like you to tell me if those do relate to the game Head-On that you referred to.

A In two of the photographs I see the name "Head-On" mentioned.

Q Do you recognize the game in the others?

A Without the game here before me, it is very difficult to testify on the subject. It's a different game and it is the subject of a different copyright. I have an exclusive license to that copyright.

Q That is what I understood. That game has been out since about 1979?

A It says, "Copyright 1979."

Q Do you have any reason to believe that that is not correct?

A No, I don't have any reason to believe this is not correct.

Q Now with respect to the photograph showing the display, Exhibits 8, 6, 7, and 9, to the best of your knowledge, don't they convey the video display, the visual display in the Head-On game?

A There is a game similar to Head-On in these photographs. I can't testify that is Head-On.

Q Do you know of anything in those photographs which would lead you to believe it isn't Head-On?

A No.

Q And that is a game in which the player is trying to avoid an enemy car?

A It is not a chase game.

Q The player is trying to avoid an enemy car?

A Trying to avoid a head-on collision.

Q And he is eating up dots?

A No. It is an automobile that is going around a track. It is not eating or munching anything.

Q All right. The dots disappear as he engages them?

A Yes, I think you are correct.

Q He gets a score as he does that?

A I am not sure about that.

MR. ANDERSON: All right. No further cross examination

THE COURT: All right.

MR. VITTUM: That's all, Judge.

THE COURT: All right, thank you.

THE COURT: (Witness excused.)

MR. VITTUM: The plaintiffs rest, your Honor.

THE COURT: The plaintiffs rest. Let us go over for a moment, the exhibits which you have marked just to make sure they have been offered or if they have not been offered, why.

I show Plaintiffs' Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 to 12, inclusive, have been admitted in evidence. Exhibit 13, there was an objection to that. It was sustained. And you have marked as an Exhibit 16, the Pac-Man --

MR. VITTUM: We have not offered that. There is really no reason to, your Honor.

THE COURT: No. I will rule that should be admitted in evidence. (Said exhibit was received in evidence as Plaintiff's Ex. 16)

MR. VITTUM: Surely.

THE COURT: So we will know what we are referring to.

MR. VITTUM: 17 was offered, I believe, and received.

It was the magazine, United Mainliner Magazine.

THE COURT: That is right. That has been received in evidence, 17 has been received in evidence.

MR. VITTUM: And there is no 14, your Honor.

THE COURT: No, 14. All right.

MR. ANDERSON: Your Honor, you have admitted Defendants' Exhibits 4 and 5.

THE COURT: 4 and 5 under Rule 106, the rule of completeness. All right.

MR. ANDERSON: Just so I don't forget, I will offer 1, 2 and 3 now, too.

THE COURT: 1, 2 and 3. All right.

MR. ANDERSON: Exhibit 1 was the Electronic Game magazine.

THE COURT: Any objection?

MR. VITTUM: No objection.

THE COURT: 1, 2 and 3 of the defendants are admitted in evidence.

(Said exhibits, so offered, were received in evidence as Defendants' Exhibits 1, 2 and 3.)

MR. ANDERSON: Exhibit 2, your Honor, is the console for the Odyssey 2 game.

THE COURT: All right.

MR. ANDERSON: And Exhibit 3 is the instruction book

for the K. C. Munchkin game.

THE COURT: All right.

MR. VITTUM: No objection to any of them, Judge.

THE COURT: They are admitted in evidence. That makes it five exhibits of the defendants in evidence.

All right.

MR. ANDERSON: Your Honor, I would like to call Mr. William Kunkel as my first witness. I am calling him first because he is from out of town and has been good enough to come here. It is not the order in which I planned to call him.

THE COURT: All right, Mr. Kunkel.

MR. ANDERSON: Thank you very much.

WILLIAM H. KUNKEL,

called as a witness by the defendants, having been first duly sworn, was examined and testified as follows:

THE CLERK: Be seated, please. State your full name, spell your last name, lean forward and speak directly to that microphone. Keep your voice up.

THE WITNESS: My name is William H. Kunkel, K-u-n-k-e-l.

MR. ANDERSON: Your honor, before proceeding with this witness, I would like to move that the motion brought by the plaintiffs be denied. I think they have failed to make out a showing of likelihood of success

and in proving infringement.

I think they have totally failed to show any irreparable harm or damage that they will suffer if this preliminary injunction is not denied and, therefore, I think they have failed to make the two essential elements, either of the two essential elements of their motion.

THE COURT: Because of the nature of the hearing, I am going to overrule the motion. I want to hear evidence. Then I want you to do something for me. I want to look at those two games, if we can do it tonight. If we can't do it tonight, we will have to discuss when I can do it. But let's finish. See if you can call your witnesses. Let me ask you, do you think you can do, Mr. Anderson, today?

MR. ANDERSON: Our complete case? Not a chance, your Honor. I am sorry. I wish I could. We have four witnesses. Two will be quite short. We have the creator of K. C. Munchkin.

THE COURT: All right.

MR. ANDERSON: But he will take no time.

THE COURT: Let us go until 5:30. Just before 5:30 I am going to have to ask you to tell me when we can conclude hearing these witnesses. I cannot go beyond 5:30, I just want to tell you that.

MR. ANDERSON: I believe that your Honor will get

1 a great deal of benefit by seeing the games up close  
2 and maybe manipulating them, even, and I might suggest  
3 and you will see the reason I suggest this -- with this  
4 witness it might be well to have you do that because of  
5 the nature of the witness.

6 THE COURT: Let us go ahead with him.

7 DIRECT EXAMINATION

8 BY MR. ANDERSON:

9 Q Mr. Kunkel, please state your age and home address.

10 A I am 31 years old. I live at 8530, 121st Street,  
11 Two Gardens in New York City.

12 Q What is your present occupation?

13 A I am Executive Editor of Electronic Games Magazine.

14 Q Will you tell us what Electronic Games Magazine is,  
15 please?

16 A Yes. It is the first magazine devoted to the  
17 electronic game industry, all aspects of it, from the hand  
18 held games to the home video games and the coin-operated video  
19 games.

20 Q I hand you a copy of Defendants' Exhibit 1. Can you  
21 identify that?

22 A This is the first issue of Electronic Games.

23 Q Can you tell me when that first issue came out?

24 A It appeared on the newsstands October 29th.

25 Q And what has the experience been with respect to the

magazine, Electronic Games?

A Well, it sold tremendously well. The print run for the second issue will be almost tripled.

Q Do you have -- did you say something?

Do you have any other present occupations in addition to your role as Executive Editor of the magazine, Electronic Games?

A I run, in a freelance basis I have written for the New York Times, Penthouse Magazine, Video Magazine on the subject of electronic and video games.

Q Do you have a column in any of those magazines?

A I co-author Arcade Alley which is a regularly appearing column in Video Magazine and have done it for approximately three years.

Q And what is Arcade Alley?

A It is the first column to regularly cover the field of video games, home video games.

Q And what other areas have you worked in in addition to those you have already described?

A I have worked as a freelance writer for over ten years now. I have worked in comic books and I have worked in trade journalism, sports journalism and several other fields.

Q Prior to entering into those professions, did you attend college?

A I attended Pace College for two years, now Pace

University in New York City. reader poll, it was right after

Q What curriculum were you following?

A Liberal Arts.

Q How did you get started in writing about video games?

A In 1978 my partner and I purchased -- I purchased an Odyssey 2. My partner purchased an Atari VCS. We went to Video Magazine with the suggestion of a regular column.

The idea was accepted. After about two years of running the column, a reader poll was done in which they determined that it was a very popular feature and as a result of that popularity, we were able to convince the publisher of the viability of a regularly appearing magazine on the subject.

Q Do you have any technical training or knowledge of the electronics that go into this game?

A I am not a programmer. I try to view these things strictly from the point of view of a player, of the person who is going to take the game out of the box, stick it in the machine, pick up his controller and start to play it.

I have picked up some technical knowledge in the course of researching the field but I still try to approach it from the point of view of someone who does not know anything about the technology behind the game.

Q Can you tell us how popular -- how does Arcade Alley stand among the various contributions to the Video Magazine?

A According to the reader poll, it was right after the new products column, it was the most popular feature in the magazine on a regular basis.

Q Now with respect to the Electronic Games Magazine, will you describe a little bit about how that got started?

A It was simply a case of the publisher, our publisher, J. Rosenfield, being convinced by us that this was the right time, that this was the industry that was booming and that consumers needed some sort of information. There was no way people could know anything about whether games were good, whether they were bad, what they were like, what they looked like and how they were played. He became convinced that the time was right, that advertising and newsstandwise, that this was a viable property at this point.

Q Are you aware of an arcade game called Pac-Man?

A Yes, I am.

Q Will you describe how you became aware of it?

A I first played Pac-Man well over a year ago, I believe

When the game first came out, it didn't really catch on to that great an extent, it was sort of a sleeper. It really caught fire this year, early 1981, and especially over this past summer, it became indisputably the most popular coin-operated game in the country.

Q With respect to standing as of, say, the year 1981, do you have any information as to how the various games have

stood?

A In terms of what?

Q In any volume, use, or popularity ratings?

A Well, there are two trade magazines for the coin-operated industry, Replay and Playmeter. Both polled arcade operators around the country to determine how much money various machines are taking in at any given time and Pac-Man, I have heard anywhere from 200 to \$250 a week per profits in terms of Pac-Man machines.

Q Does Arcade Alley or Video Magazine give out any awards?

A Yes. We began the process -- we began an awards process the first year we did the column and we have just given out our third set of Arcade awards. In fact, Pac-Man was the winner of the best coin-operated game for 1981.

Q And how many different categories of awards do you give?

A We have increased the number of categories each year. I believe this year we had 12 categories. There was only one category in the coin-operated field.

Q As a knowledgeable player of arcade games, what has made Pac-Man popular?

A There are, I think several things. I think it is the first game that really appealed to the female arcade players because, for one thing, it isn't intimidating. If

1 you look at many of the contemporary arcade games, there are  
2 buttons all over the place. The instructions are usually  
3 fairly limited. They usually consist of telling you where  
4 to put the quarter. And you have got to drop a couple of  
5 bucks in the machine before you can have any idea what you  
6 are doing with it.

7  
8 Pac-Man, you can see is just a stick, just a joy  
9 stick, that moves in one of four directions. The simplicity,  
10 the ease with which the game can be understood and played is  
11 considerable, while at the same time, it is not the sort of  
12 game that you can just sit down and master instantly like  
13 most very popular coin-operated games, such as Space Invaders  
14 and Asteroids.

15 The basic concept of the game is simple. But the  
16 ability to master <sup>it</sup> requires practice.

17 Q With respect to home TV games or home video games,  
18 the ones you are familiar with, do they usually have a single  
19 joy stick with which the game is played?

20 A Yes. There are basically two types of controllers  
21 used in home games, the paddle type and the joy stick type.

22 The paddle type is a wheel that is turned and that  
23 is generally used for games where you are simply moving  
24 something back and forth or up and down. When you are moving  
25 something in as many as four different directions, obviously,  
the joy stick is preferable.

Q And has that been true for a decade?

A Oh, the joy stick is the one common denominator in the home field that you show anyone a joy stick who plays home video games and they are going to recognize what it is.

Q As to the actual play of the game, has there been anything that has made Pac-Man popular with respect to the play of the game?

A It is -- the graphics, of course, are very distinctive and they are very cute, they are very charming. They appeal to the arcade player who is very much into the graphics, who is very much into the way the game looks, the way the game sounds and the way the game plays.

Again, it is a simple concept. It is easy to pick up. You can basically learn what you are doing and you may not play very well but you will at least know what you are doing almost instantly.

Q Now is this what you call a maze chase game?

A This is a maze chase game, yes.

Q Have there been maze chase games before Pac-Man?

A Oh, yes, absolutely.

Q Can you just name --

A (Continuing) the first maze chase game I ever played personally was an Odyssey 2 game called "Take the Mondy and Run." There have also been games such as Dodge 'Em and Head-On in which you are moving through a multi-layered playfield,

a multi-tiered playfield while either being pursued or attempting to avoid another object on that playfield.

Q And in Gremlin Head-On in particular, does the car remove dots as it goes and score --

A As the car passes over the dots, the dots disappear from the playfield.

Q Are you familiar with a game called Carnival?

A Yes, I am.

Q Can you briefly describe that game?

A Carnival is a video game version of a shooting gallery in which objects move across the top of the screen, typical shooting gallery-type objects, bunnies, ducks and the player maneuvers a gun horizontally across the bottom of the playfield and attempts to eliminate the various objects.

The duck in the game, if the duck is allowed to get all the way to the bottom, the objects move from top to the next level, to the next level and they keep moving down the screen.

As the duck reaches the bottom of the playfield, he then flies down and consumes your bullets. You have a certain number of bullets, each represented on the bottom of the playfield.

Q And you moved your fingers, indicating actually eating. It is just the duck head you see?

A It's -- I believe you see the entire duck coming --

and he comes down and opens his mouth and eats the bullets one at a time.

Q And how far back does Carnival go?

MR. VITTUM: Your Honor, I would object to this whole line of questioning. Validity of copyright is not an issue. Therefore, originality is not an issue. The issue is one of substantial similarity. It is a simple issue that can be determined from these two games.

THE COURT: The issue is whether there has been copying.

MR. VITTUM: Pardon me?

THE COURT: The issue is whether there has been copying.

MR. VITTUM: And substantial similarity.

THE COURT: And substantial similarity.

MR. VITTUM: That's correct.

THE COURT: Let us not forget what is involved here.

MR. VITTUM: That's right, Judge.

THE COURT: All right. So now why is this necessary, Mr. Anderson?

MR. ANDERSON: Your Honor, I think the issue is whether there has been copying of the audio-visual expression and not the concept.

THE COURT: Yes, the issue is whether there has been copying by whether or not there is such a substantial

similarity, and then we can tell whether there is copying by other factors. That is why I want to look at these two games. And then there are some questions I want to ask you. But now there is an objection. What is the necessity of going into this, Mr. Anderson?

MR. ANDERSON: Your Honor, there is a genre from which all games build and I think it is important that the record show what that is and that is the purpose and I am finished, virtually, with the point.

THE COURT: Go ahead, Mr. Anderson. You were going to say something?

MR. VITTUM: Judge, I was going to say, to the extent of the Jawbreaker game, we were going to show that this very same copyright was enforced against is not relevant, surely ducks and automobiles and all the other kind of games we are hearing about are irrelevant.

THE COURT: I will sustain the objection. Let's proceed now. I will say it again, we are not here hearing this case on the merits. It is only a preliminary showing whether or not the plaintiffs are entitled to preliminary injunctive relief. Now let us proceed now.

BY MR. ANDERSON:

Q Mr. Kunkel, did you, in playing Pac-Man, identify any drawbacks in the Pac-Man games?

A The only drawback, as a regular player of Pac-Man,

is that it is possible to develop a pattern.

Q A pattern?

A In other words, if you move through the maze in the same way every time, unless you make a mechanical error, you will be able to finish off maze after maze after maze.

Of course, the ghosts or gobblins are becoming faster with each round. Each time you finish up a playfield, they are a little bit faster. It still, however, is a matter of developing a pattern. You go through this row, then you go through that row and then you go through this row. This pattern actually exists. It is known among players. If you are successful mechanically in navigating that pattern, you will be successful in this game.

Q Then is that in part because the maze is fixed and never changes?

A It is a fixed maze with stationary dots.

Q Are you aware of a cartridge for the Odyssey game which is called K. C. Munchkin?

A Yes, I am.

Q Can you tell me how you became aware of that?

A An advance copy was sent to our offices approximately a month ago.

Q Can you describe K. C. Munchkin for us, please.

A K. C. Munchkin is also a maze chase game, obviously inspired by Pac-Man, with some differences that are considerable

in terms of the play. The fact that the dots are moving, the fact that the maze is changing, make the game, in terms of playing it, different.

Q Can you describe --

And perhaps, even if your Honor would please, perhaps Mr. Kunkel could even demonstrate it.

THE COURT: Let him do it. We only have ten minutes.

MR. ANDERSON: Would the Court consider stepping down?

THE COURT: No. I can see it from here.

BY THE WITNESS:

A The dots, as you can see here, your Honor, the dots are stationary. They are not going to move. Here they are moving (indicating). That means that you cannot move through this maze the same way every time and be successful.

BY MR. ANDERSON:

Q And you are referring to the Odyssey Munchkin?

A The K. C. Munchkin.

Q Yes.

A When you begin a game, you have got to adapt your strategy constantly to the shifting position of munchies. You also have to adapt your play to the fact that at least in this version, the corral here, from which the faces there are coming, is constantly shifting.

Q That is the center box?

A That is the center box.

Now in Pac-Man, the goblins are always emerging from the top and if you, therefore, can manage to avoid that when there are goblins about to emerge you are going to be safe.

Here (indicating), they are going to come out from wherever there is a vacant spot so your play has to constantly adapt to the change of the maze and to the change of the position of the various munchies.

THE COURT: All right.

BY MR. ANDERSON:

Q Do you know whether or not the speed of the dots changes in K. C. Munchkin during the course of one frame?

A I believe the dots do not change speed. The dots, however -- you mean after you have eaten the power --

Q After you have removed dots.

A Oh, the fewer dots that remain on the screen, the faster the remaining dots move. The speed with which the dots move is directly dependent upon how many are left. When you have got a full screen of dots, they don't move very fast but when you have only got three or four left, they are moving much faster and when you are down to the last one, it is really zipping around the playfield pretty quickly.

Q Do you know whether in Pac-Man the speed of the

ghost changes when a power dot is engaged?

A The ghosts slow down after a power dot is consumed in Pac-Man.

Q Does that enable the Pac-Man to just chase him and overtake him?

A Yes.

Q Now in K. C. Munchkin, though, can the Munchkin ever overtake the munchers?

A They are moving, I believe, at the same speed. Of course the munchers, the things that are pursuing you or that you are pursuing after you have eaten the power dot, are able to navigate turns in the maze generally more sharply than a human player is. Since they are being moved by the computer, they make their turns perfectly, whereas a human player is not that perfect and is, therefore, apt to lose a split second in making a turn or moving up or moving down.

Q Can you describe for us the characters in Munchkin and their visual appearance as compared to Pac-Man?

A The characters, the muncher in Pac-Man appears almost like a clam. He opens his mouth and closes his mouth.

There is a slightly different shape to the K. C. Munchkin character. He also has two antenna.

The ghosts in Pac-Man seem to be pretty straight-

forward ghosts, sheets with eyeballs, whereas I certainly get the sense of almost like insectoid characters here.

Granted, it is a superficial difference but there is a slight difference in appearance, as much difference as, say, between two super heroes, let's say, from different comic book companies, something I am a little familiar with.

Q Now are you familiar with the various mazes and modes of play in K. C. Munchkin?

A Yes. There are several different mazes. At certain levels a maze becomes invisible. In other options, the entire maze is shifting and of course there is the programmable option whereby if a player becomes too familiar with the preset mazes, an entirely different maze can be programmed.

Q Now, how long have mazes been used in games?

A In electronic games?

Q Yes.

A It is obviously something that has been around for awhile. Let us say the first one I can recall is Take the Money and Run, which I would imagine goes back to 1979.

Q And whose game is Take the Money and Run?

A That is an Odyssey 2 game in which you are navigating a character through a maze. He has to, at various times, either run from or run towards and capture various characters in that maze.

Q And under some conditions, does the character chase the player and in other conditions the player chase the character?

A Yes. The character in the maze represents a person

and the other characters represent financial conditions,  
negative or positive --

MR. VITTUM: Judge, I again object.

BY THE WITNESS:

A -- that they may hit if you run.

MR. VITTUM: We are back to the ducks and the  
cars and the characters --

THE COURT: The objection will be sustained.

BY MR. ANDERSON:

Q Are you familiar with the Munchkin sounds, Mr. Kunkel?

A Yes. The sounds for K. C. Munchkin are familiar  
to me, having played many Odyssey games that the sound  
vocabulary in any home video game is limited and therefore,  
the same sounds tend to be used again and again.

Q So the Odyssey sounds that you are familiar with  
are in the Munchkin game also?

A Yes. They are fairly the same.

Q Are there any sound similarities between the Munchkin  
game and the Pac-Man game that you recognize?

A The sound as the muncher moves through the playfield,  
the munching sound, there is a duplication of that.

Generally speaking, again, the sound, what you  
can do with a home video game in terms of sound is fairly  
limited at this point.

Q Again, in the genre of video games, is it a common

the munchers, the three munchers sound like they are munching. Is that the sound you are talking about?  
Q Oh, the sound as the playing piece moves through the field?

A They are generated inside the little console, the central box and then they come out through the speaker.  
Q Oh, the sound is invariably an important factor in home video games, just as it is in coin-operated video games.

A Occasionally, yes, they are usually more together.  
THE COURT: I didn't hear that.

THE WITNESS: Is invariably very important.

THE COURT: Very important?

THE WITNESS: Yes, sound is a very important element to these games.

THE COURT: All right. Go ahead.

BY MR. ANDERSON: Your Honor, I would like to ask you to go back to the time you were playing these games, about five minutes ago.

Q But in earlier games, was it also common to have a sound, a repetitive sound as a player-controlled piece moved?

A Oh, yes.

Q That was in the genre of games again?

A Very similar.

Q Would you consider Pac-Man and K. C. Munchkin different games?

A In terms of play, they play differently. They are both maze chase games and they both have similar elements to them.

In terms of a player, of someone sitting down and playing both games, they are different games.

Q Another point: With respect to the manner in which

the munchers, the three munchers appear in Odyssey, K. C. Munchkin, how do they appear when they come onto the screen?

A They are generated inside the little corral, the central box and then they move out onto the playfield.

Q Are they superimposed, one upon the other?

A Occasionally, yes, they occasionally move together as you can see, your Honor, and then they will separate so that you might think there is only one and they will split up and you have got two of them.

THE COURT: Mr. Anderson, let me interrupt. It is now 5:25 p.m. What was your plan about this now?

MR. ANDERSON: Your Honor, I would finish within those five minutes. I don't know how much cross Mr. Vittum will have.

THE COURT: And then Mr. Vittum will want to cross examine. How long is this going to take?

MR. VITTUM: We have about two minutes of cross examination, your Honor, based on what has gone on so far.

THE COURT: All right. Go ahead. Then we can finish with this witness.

BY MR. ANDERSON:

Q From your knowledge of the industry, Mr. Kunkel, who are the potential customers of the K. C. Munchkin cartridge made by Odyssey?

A People who own the Odyssey 2.

Q With respect to those who don't, what -- from your experience again, are they very likely to go out and buy a console if they already have another one or just what is your experience?

A We have experienced, in my experience, people who are rabid game players who will often own more than one system.

I think K. C. Muchkin is a cute game but I do very much doubt that anyone would buy the main line system simply for that game.

Q Would any Atari console owner have any reason to buy a K. C. Munchkin cartridge?

A I would very much doubt it since it is general knowledge that Pac-Man is coming out in a month or so.

Q Tell me, Mr. Kunkel, again, in your experience, what would it mean to Odyssey if it was forced to withdraw the Munchkin cartridge from the market?

MR. VITTUM: Objection, your Honor. I am not sure this witness who is an independent person would qualify to say what would happen to Odyssey.

THE COURT: What about that? How would he know?

MR. ANDERSON: I think he would know --

THE COURT: Why don't you ask him -- I will overrule the objection and let you ask him preliminary questions

and then reserve the right to object again. Let us find out if he knows.

BY THE WITNESS:

A It would be very difficult. I can only make estimate on it --

MR. VITTUM: Your Honor --

BY THE WITNESS:

A -- which company --

THE COURT: That's enough. The objection will be sustained.

MR. ANDERSON: Your Honor, that completes the direct examination.

THE COURT: All right. Cross examination.

MR. VITTUM: Your Honor, Mr. Krupka, my partner, will conduct this cross examination.

THE COURT: All right. Proceed.

CROSS EXAMINATION

BY MR. KRUPKA:

Q Mr. Kunkel, the K. C. Munchkin game and the Pac-Man game are very similar, in terms of graphics, that is, they look substantially the same, don't they?

MR. ANDERSON: I object, your Honor. That is two questions.

THE COURT: The objection is sustained. The form of the question is objectionable.

MR. KRUPKA: I am sorry. I will only take them one at a time.

BY MR. KRUPKA:

Q The K. C. Munchkin game and the Pac-Man game are very similar in terms of graphics, aren't they?

A There are similarities.

Q And they look substantially the same, don't they?

A I have seen games that look at lot more like Pac-Man.

Q That came out after Pac-Man?

A Yes.

Q And they are coin-operated games, is that correct?

A Jawbreaker which you mentioned before is a direct copy of Pac-Man.

MR. KRUPKA: That is, your Honor, the one we got a temporary restraining order in California on Monday of this week.

THE COURT: All right.

BY THE WITNESS:

A But I think -- you know, this is something where anyone can see, you can look at that and you can look at that, there are similarities and there are differences.

As someone who has looked at a lot of playfields, there are -- they do not -- no one is going to walk in and say, "This is Pac-Man," who knows anything about video games.

BY MR. KRUPKA:

Q Well, the first time you saw a K. C. Munchkin, what was your reaction?

A A maze chase game, based on Pac-Man.

Q And the fact that you thought it was based on Pac-Man was because of the similarities between K. C. Munchkin and Pac-Man, is that correct?

A There are, indeed, similarities.

Q And in fact the K. C. Munchkin game uses a gobbler figure, doesn't it? It eats things?

A It uses -- right.

Q And the Pac-Man was the first video game to use a gobbler figure, wasn't it?

A Yes, it was.

Q Pac-Man was also the first video game to have a wraparound feature where the gobbler can exit the maze through a tunnel on one side of the maze and reappear on the other side of the maze, isn't that true?

A This is something I really question. I have been playing video games with the scroll-in feature where you can scroll up the right, come onto the left, scroll up the bottom, come onto the top, even scroll diagonally. I have been playing those games for years.

Q But isn't Pac-Man the first game where a figure would exit through a tunnel and reappear on the other side

of the maze in a corresponding --

A Oh, yes, with the maze setup, the maze format, yes.

Q And isn't it true that Pac-Man is the first game to use a gobbler where when it was being chased opponents but when it ate a power capsule or a power pill, the opponents would turn color and then the gobbler figure could chase and capture the opponent?

A This is definitely one of the most distinctive features of Pac-Man.

Q And each of those features that we have just discussed with respect to the gobbler figure, the tunner wraparound feature and this munching of power pills and changing of color and turning the tables on your opponent, those are also true in the K. C. Munchkin game, isn't that true?

A Yes, there are.

Q Now you mentioned something about the programability of mazes. When you are playing a single game of K. C. Munchkin, the maze stays the same, for example, in the format that is set out in the video camera right now or on the video screen right now, which is the same one disclosed in the advertisement, that maze stays the same while you are playing the game, doesn't it?

A Well, no, it doesn't because the corral, the central box from which the characters are emerging is constantly

shifting.

151

Q But the gobbler doesn't go into that box, right?

A No.

Q The gobbler wants to stay away from that box?

A The gobbler wants to stay away from that box but the point is that he simply can't avoid by staying away from the top -- there is an exit in Pac-Man, the exit is on top. You could simply avoid that.

Since the exit here is always shifting, it is impossible to adapt your strategy to where you can simply avoid being where those characters are going to exit from.

Q Mr. Kunkel, the programability feature that you were talking about in the case of K. C. Munchkin and being able to change the different mazes for different levels of skill, that only enters into the effect if you have got a skilled player, isn't that correct?

A Yes, sir.

MR. KRUPKA: I have no further questions.

THE COURT: Any redirect?

MR. ANDERSON: Just a bit, your Honor.

#### REDIRECT EXAMINATION

BY MR. ANDERSON:

Q Mr. Kunkel, on cross you were asked if Pac-Man was the first game in which there was a figure that gobbled up other pieces and I think previously you had identified

Carnival as doing that, is that correct?

A Yes, that's true. There was a character that ate -- that duck that eats bullets.

MR. KRUPKA: Your Honor, I believe that related to the objected-to testimony concerning the duck or something.

THE COURT: The objection is sustained.

MR. ANDERSON: He was asked on cross that very question, your Honor.

THE COURT: The objection is sustained because we have heard enough about that.

BY MR. ANDERSON:

Q Now I think you were asked a question about whether the maze stays the same or not. In many of the modes, the maze changes in many respects?

A In the later levels, this is again a progressive game where the more skilled you become and once you master a maze, you want to move on and at later levels, the entire maze is shifting.

MR. ANDERSON: I will press the No. 4, your Honor.

BY MR. ANDERSON:

Q Do you know, is that one of the games where the maze will be changing?

A I don't believe so. I believe it is one of the

other options.

MR. KRUPKA: I'm sorry. I didn't hear the answer.

THE COURT: Would you state it again?  
BY THE WITNESS:

A I believe it is one of the other options. That is the invisible, yes. There is a version where the maze is invisible and there is a version where the entire maze is shifting, where all the various elements are moving around.

THE COURT: All right.

MR. ANDERSON: That completes the redirect examination.

THE COURT: Any recross?

MR. KRUPKA: No, your Honor.

THE COURT: All right. Thank you, Mr. Kunkel.

You are excused.

(Witness excused.)

THE COURT: Mr. Grice, would you come over here, please?

Now if you gentlemen wish, I can hear this case -- I have to make some changes in programming because a week ago I ascertained that nobody wanted to come to Court the day after Thanksgiving but if you gentlemen think that the only way to dispose of this matter to hear it Friday, I will make arrangements to have the staff here to hear you Friday.

MR. VITTUM: Your Honor, on behalf of the plaintiffs, let me just say that we do think it is important to obtain a resolution of this matter as promptly as

possible.

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As the testimony from Mr. Gallo indicated, there are substantial large quantities being shipping as of December 1st to the Chicago market at least and we view it, from Atari's standpoint, as of critical importance to obtain a resolution of this matter before the games are beyond the control of the immediate defendants and before the substantial quantities of thousand-unit orders are out there in the field where the certain confusion Mr. Gallo testified to is occurring, so we would very much like to have this matter resolved as promptly as possible.

If that means inconveniencing the Court and the staff as well as my office and the client, we would like to do so.

THE COURT: Miss Arboit, can you have someone here Friday?

THE REPORTER: I will have to call, but I can be here.

MR. VITTUM: Judge, if the defendants would commit not to ship the sizable quantities for a few days until we can get the matter resolved, sort of hold the status quo, if you will, it would not be necessary, I think, for the plaintiffs to press as we have for an early resolution.

MR. ANDERSON: We won't ship on Thanksgiving Day, your Honor. I don't have any idea what shipping plans there are. I just don't know. I am willing to go on Friday also.

THE COURT: Let me ask another question. What did you hear, Mr. Grice, about -- what is that criminal case we had set for Monday? What did you hear about that?

THE CLERK: They will not be starting Monday. There is a new attorney substituting in the case.

THE COURT: But you have the National Can case coming up?

THE CLERK: Starting at 10:00 o'clock.

THE COURT: Now let me ask you this now: How much more time in terms of hours is this case going to require, that is, the hearing so I can finish hearing the evidence? How much more time is there?

MR. ANDERSON: Your Honor, I would estimate we probably would ask for between two and three hours to finish. Maybe I am off. I don't think I am short but I will try to finish in less than that but I wouldn't want to make any promises.

MR. VITTUM: So far no rebuttal, Judge.

THE COURT: We can meet at 9:00 o'clock on Monday morning the 30th of November and I can just pick up here. You can leave all this equipment right here. This courtroom will be locked. And we can finish hearing this Monday morning.

MR. VITTUM: That is agreeable to us, your Honor.

MR. ANDERSON: Your Honor, I might just ask if no one objected, I would suggest we start a little later. Our witnesses --

THE COURT: I can't start later. No. We are going to

start Monday -- Mr. Anderson, I had set another case on trial to begin at 10:00 o'clock. What I plan to do is tell Mr. Grice to tell the lawyers in that case that we will start at 2:00 o'clock.

I will give you all the morning, beginning at 9:00 o'clock on Monday morning, the 30th. I will hear you all morning Monday and until --

MR. ANDERSON: That is fine, your Honor. I was feeling sorry for the people that have to travel on both sides. I know there are a lot of them, that's all.

MR. VITTUM: Your Honor, if representatives of the defendants are in Court, could we perhaps obtain some information as to whether they can forestall shipment --

THE COURT: Now, Mr. Vittum, you have asked that question twice. Mr. Anderson said he can't tell you that. I will hear you at 9:00 o'clock Monday and that's it, now.

MR. VITTUM: Thank you.

THE COURT: I will hear you at 9:00 o'clock and we will finish hearing the evidence.

If in the meantime you can work out some agreement, do that. I gather Mr. Anderson just said he didn't know.

MR. VITTUM: Thank you, your Honor.

THE COURT: I will meet you at 9:00 o'clock Monday morning the 30th of November.

MR. VITTUM: Thank you, your Honor.

THE COURT: Fine.

THE CLERK: The court stands adjourned.

(Thereupon an adjournment was taken to  
Monday, November 30, 1981 at the hour  
of 9:00 a.m.)

MILLERS FALLS  
E-ZIERASE  
COTTON CLOTHING